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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 82

THE STATE OF ALABAMA, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 15, 1930

CERTIORARI GRANTED JUNE 2, 1930

(34,948)

(34,948)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 817

THE STATE OF ALABAMA, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1930

[fol. 1]

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA, Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The State of Alabama prays that a writ of certiorari issue to the United States Court of Claims directing that Court to certify to this Court the record in the case of State of Alabama v. The United States, No. J-607 in that Court, in order that the decision and judgment of said Court, rendered on March 12th, 1930, may be reviewed.

Statement of Case

This suit was brought by the State of Alabama to enforce collection from the United States of a license or privilege tax imposed by the State of Alabama upon the business of manufacturing and selling hydro-electric power within the State of Alabama.

The legislature of the State of Alabama passed a revenue law, approved July 22, 1927, (General Acts of Alabama [fol. 2] 1927, Pages 139, et seq.), which provides, among other things, as follows:

"Section 1. Every person, firm, company, corporation or association engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act or any other Act. * * *

Section 2-D. In addition to all other taxes of every kind now imposed by law or otherwise imposed by this Act, there

is hereby levied a license or privilege tax upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydro-electric power in the State of Alabama for the privelege of engaging in such business; said license or privilege tax shall be due and payable in advance on the first day of October of each year, and shall be in a sum equal to two-fifths of a Mill (2/5) upon each kilowatt hour of hydro-electric power manufactured and sold during the preceding calendare year. * * *

Section 72. * * * in all proceedings under this Act, the license due October 1st shall not be delinquent before the first day of November of each year. * * *

During the calendar year 1926, the United States manufactured approximately 432,629,000 kilowatt hours of hydro-electric power at Wilson Dam in the State of Alabama, of which it sold approximately 429,311,000 kilowatt hours to the Alabama Power Company, a corporation carried on by private capital, and the remainder it used for its own purposes. Since October 1, 1927, and continuously up to and including the date that the petition was filed in this case, the United States has exercised the [fol. 3] privilege of manufacturing and selling hydro-electric power in the State of Alabama to the Alabama Power Company.

The State of Alabama assessed and made demand upon the United States for the payment of the tax imposed by the act of July 22, 1927, on account of the manufacture of approximately 429,311,000 kilowatt hours and the sale of the same to the Alabama Power Company, in the amount of approximately $173,051.60, but the United States refused to pay the tax. This suit was brought for the collection of that sum, together with interest thereon at eight per cent per annum.

A demurrer to the petition was interposed by the United States and was sustained by the Court of Claims in its decision rendered March 12, 1930.

The Issues

I. Where the Federal Government, as an incident to the exercise of an implied power under the Constitution, en-

gages in a business of a private nature, is it cloaked with immunity from taxation by the State to the same degree that it would be if it were engaged in the performance of an immediate and direct sovereign power?

II. Where the Federal Government, as an incident to the exercise of an implied power under the Constitution, engages in the business of manufacturing and selling hydro-electric energy, upon which businss the State seeks to collect a privilege tax, would the imposition of such a tax tend to hamper or cripple the United States in the performance of governmental functions?

[fol. 4] III. Where the Federal Government engages in a business of a private nature within the legitimate field of taxation of a state, such business being only remotely connected with the performance by the United States of a governmental function, may the State levy a tax upon the operation of such business where the tax does not tend to hamper or cripple substantially the United States in the performance of governmental functions?

Reasons for Granting the Petition

I. In the view of the petitioner, the Court of Claims erred in holding as follows:

(a) That where the Federal Government, as an incident to the exercise of an implied power under the Constitution, engages in a business of a private nature, it is cloaked with immunity from taxation by the State to the same degree that it would have been if engaged in the performance of an immediate and direct sovereign power.

(b) That where the Federal Government engages in a business of a private nature connected only remotely with the performance of a governmental function, the imposition of a privilege tax upon such business by the government of the State within which the business is carried on tends to hamper or cripple the United States in the exercise of a governmental function.

(c) That the manufacture and sale by the Federal Government to a private corporation of hydro-electric power in

the State of Alabama was an immediate and direct exercise of a sovereign power.

II. The decision of the Court of Claims is contrary to the principles announced by this Court in the cases of South [fol. 5] Carolina v. United States, 199 U. S. 437, and Metcalf v. Mitchell, 269 U. S. 514.

The determination of the questions involved herein vitally affects the people of every state of the Union. The decision of these questions is of the utmost importance, because it will determine the extent to which the Federal Government may invade, immune from State taxation, the domain of private business which is subject to taxation by the states, and will determine the extent to which the legitimate sources of state taxation may be withdrawn or destroyed by action of the Federal Government. These questions go to the very root of government, State and Federal, in the nation.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the U. S. Court of Claims should be granted.

Charlie C. McCall, Charlie C. McCall, Attorney General for the State of Alabama. A. A. Evans, A. A. Evans, Assistant Attorney General for the State of Alabama. Thomas E. Knight, Jr., Thomas E. Knight, Jr., Special Assistant Attorney General for the State of Alabama.

[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. J-607

STATE OF ALABAMA

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On September 11, 1928, the plaintiff filed its original petition.

On October 20, 1928, the defendant filed a general traverse to said petition.

On December 1, 1928, on motion made therefor and allowed by the court, the defendant withdrew the general traverse and filed a demurrer.

On April 1, 1929, plaintiff filed a motion for leave to file an amended petition. Said motion was allowed in open court.

On the same date a stipulation was filed that the demurrer to the original petition shall be deemed to apply to the amended petition.

On the same date the demurrer to the amended petition was argued and submitted by Mr. George H. Foster, for the defendant, and by Messrs. Thomas E. Knight, Jr., and Aurelius A. Evans, for the plaintiff.

On May 9, 1929, the plaintiff filed its amended petition, which is as follows:

[fol. 2] II. AMENDED PETITION—Filed May 9, 1929

To the Honorable the Chief Justice and Judges of the Court of Claims:

I

The plaintiff is the State of Alabama, a sovereign State of the United States of America.

II

The plaintiff files this petition to recover from the United States the sum of One hundred seventy-three Thousand and fifty-one and sixty one-hundredths Dollars ($173,051.60), [fol. 3] together with interest thereon at 8 per cent per annum from to wit November 1, 1927, together with 15 per cent thereof as a penalty thereon for the failure of the said United States to pay to the State of Alabama the said sum of money when due.

III

The plaintiff avers that heretofore the United States constructed Wilson Dam across the Tennessee River at Muscle Shoals in Alabama, and that the said United States

has heretofore constructed a power plant in connection with said Shoals in Alabama, which said plant is used by the said United States in manufacturing and developing hydro-electric energy. The plaintiff avers that the said United States has sold to the Alabama Power Company during the calendar year 1926 approximately 429,311,000 kilowatt hours of hydro-electric power developed by said plant in said State of Alabama. The plaintiff avers that since October 1, 1927, and continuously up to and including this date, said United States has exercised the privilege of manufacturing and selling hydro-electric power in the State of Alabama to the Alabama Power Company, a corporation.

IV

The plaintiff avers that the Legislature of the State of Alabama passed a revenue law, approved by the Governor of Alabama July 22, 1927, which provides, among other things, as follows:

"Section 2-D. In addition to all other taxes of every kind now imposed by law or now imposed by this Act, there is [fol. 4] hereby levied a license or privilege tax upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydro-electric power in the State of Alabama, for the privilege of engaging in such business; said license or privilege tax shall be due and payable in advance on the first day of October of each year and shall be in a sum equal to two-fifths of a mill upon each kilowatt hour of hydro-electric power manufactured and sold during the preceding calendar year."

The said revenue law of Alabama, approved July 22, 1927, also provides that in case said tax is not paid when due, then 15 per cent thereof shall be payable thereon as a penalty for the same not having been paid by the time it was due under said revenue law; and said Act of the Legislature of the State of Alabama hereinbefore referred to provides that said tax shall be due and payable on, to wit, November 1, 1927. And the plaintiff further avers that there has been demanded of the said United States the tax due by said Government on 429,311,000 kilowatt hours of hydro-electric power sold by said Government to the Ala-

bama Power Company, a corporation; and that said Government has failed and refused to pay said tax, and that said tax, not having been paid when due, the said Government is liable for said tax and the interest thereon since November 1, 1927, and 15 per cent thereof as a penalty thereon for the failure to pay said tax when the same became due under the provisions of said Act of the Legislature of Alabama, approved July 22, 1927.

That during the calendar year 1926 the total amount of hydro-electric power generated by the United States at the power plant referred to in paragraph III hereof was 432,629,000 kilowatt hours, of which the United States used in operating locks in aid of navigation and for lighting and [fol. 5] power at its plant, 3,318,000 kilowatt hours and of which 429,311,000 kilowatt hours were sold to the Alabama Power Company, as set forth in this amended petition.

V

The plaintiff avers that while the said United States may have constructed said Wilson Dam in the said State of Alabama and a hydro-electric plant at said dam in connection therewith, and may have manufactured thereat hydro-electric power in pursuance to the National Defense Act, (Section 79, Title 50, of the United States Code; Section 124 of the National Defense Act) that said United States, after having manufactured said hydro-electric power, did sell the same to a corporation or an industry carried on by private capital.

VI

The plaintiff avers that the total amount of money claimed of the United States in this suit is a tax due for the privilege exercised by said United States, of manufacturing and selling 429,311,000 kilowatt hours of hydro-electric power sold to the Alabama Power Company, a corporation carried on by private capital, which said privilege tax amounts to approximately $173,051.60, together with interest thereon at 8 per cent per annum, and the further sum of 15 per cent thereof as a penalty thereon due on account of the failure or refusal of the United States to pay said tax when due, that is to say, November 1, 1927.

VII

The plaintiff further represents that it has always borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement [fols. 6 & 7] to rebellion against said Government; that it is the sole and absolute owner of the said claim herewith presented; that it has made no transfer or assignment of such claim or any part thereof, and the plaintiff is justly entitled to the amount claimed herein of the United States, after allowing all just credits and set-offs. The plaintiff therefore prays judgment in its favor from the United States of America in the sums set out in Paragraph VI, and the interest and penalties therein claimed.

State of Alabama. Charlie C. McCall, Attorney General. Charlie C. McCall, Attorney General. Thomas E. Knight, Jr., Asst. Attorney General.

Duly sworn to by W. E. James and Charlie C. McCall. Jurat omitted in printing.

[fol. 8] III. Defendant's Demurrer, Filed to Amended Petition, Pursuant to Stipulation—Filed April 1, 1929

Now comes the defendant, by its Assistant Attorney, and demurs to the petition herein filed September 11, 1928, and for cause thereof states that the petition does not set forth a cause of action within the jurisdiction of this Court.

Herman J. Galloway, Assistant Attorney General. Geo. H. Foster, Attorney.

IV. Order Remanding Case

It is ordered this 21st day of October, 1929, that this case be and the same is remanded to the calendar for oral argument before a full bench.

By the Court.

V. Argument and Submission on Order of Remand

On November 9, 1929, this case was argued and submitted on demurrer to amended petition by Mr. George H. Foster, for the defendant, and by Messrs. Thomas E. Knight, Jr., and Aurelius A. Evans, for plaintiff.

[fol. 9] VI. **Opinion of the Court by Graham, J., on Demurrer, and Opinion by Green, J., Concurring in the Result**—Filed March 12, 1930

On Demurrer

Graham, Judge, delivered the opinion of the court:

This case came up on demurrer to the petition. It presents the following admitted facts: Congress, by section 124 [1] of the national defense act, 39 Stat. 166, 215, authorized

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[1] Sec. 124. Nitrate supply.—The President of the United States is hereby authorized and empowered to make, or cause to be made, such investigation as in his judgment is necessary to determine the best, cheapest, and most available means for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers and other useful products by water power or any other power as in his judgment is the best and cheapest to use; and is also hereby authorized and empowered to designate for the exclusive use of the United States, if in his judgment such means is best and cheapest, such site or sites upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this act; and is futher authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products.

[fol. 10] the construction of "dams, * * * power houses, and other plants * * * for the generation of electrical or other power," admittedly in the exercise of its constitutional power. As an incident to the completion of the dam there was created a large amount of water power. The dam is known as the Wilson Dam and is situated in the State of Alabama. Section 124 of the said act authorized the President, in dealing with the "products of such plants," as follows:

"* * * any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.

"The President is hereby authorized and empowered to employ such * * * agenices as may in his discretion be necessary to enable him to carry out the purposes herein specified."

The President is authorized to lease, purchase, or acquire, by condemnation, gift, grant, or devise, such lands and rights of way as may be necessary for the construction and operation of such plants, and to take from any lands of the United States, or to purchase or acquire, by condemnation, materials, minerals, and processes, patented or otherwise, necessary for the construction and operation of such plants and for the manufacture of such products.

The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.

The President is hereby authorized and empowered to employ such officers, agents, or agencies as may in his discretion be necessary to enable him to carry out the purposes herein specified, and to authorize and require such officers, agents, or agencies to perform any and all of the duties imposed upon him by the provisions hereof.

The sum of $20,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to enable the President of the United States to carry out the purposes herein provided for.

The plant or plants provided for under this act shall be constructed and operated solely by the Government and not

The petition inter alia avers:

"* * * that heretofore the United States constructed Wilson Dam across the Tennessee River at Muscle Shoals in Alabama, and that the said United States has heretofore constructed a power plant in connection with said shoals in Alabama, which said plant is used by the said United States in manufacturing and developing hydro-electric energy. * * * that the said United States has sold to the Alabama Power Company during the calendar year of 1926 approximately 429,311,000 kilowatt-hours of hydroelectric power developed by said plant in said State of Alabama. * * * that since October 1, 1927, and continuously up to and including this date, said United States has exercised the privilege of manufacturing and selling hydroelectric power in the State of Alabama to the Alabama Power Company, a corporation.

"* * * that the Legislature of the State of Alabama passed a revenue law, approved by the Governor of Alabama July 22, 1927, which provides, among other things, as follows:

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in conjunction with any other industry or enterprise carried on by private capital.

In order to raise the money appropriated by this act and necessary to carry its provisions into effect, the Secretary of the Treasury, upon the request of the President of the United States, may issue and sell, or use for such purpose or construction hereinabove authorized, any of the bonds of the United States now available in the Treasury of the United States under the act of August fifth, nineteen hundred and nine, the act of February fourth, nineteen hundred and ten, and the act of March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed $20,000,000: Provided, That any Panama Canal bonds issued and sold or used under the provisions of this section may be made payable at such time after issue as the Secretary of the Treasury, in his discretion, may deem advisable, and fix, instead of fifty years after date of issue, as in said act of August fifth, nineteen hundred and nine, not exceeding fifty years.

"'Section 2-D:

"'In addition to all other taxes of every kind now imposed by law or now imposed by this act, there is hereby levied a license or privilege tax upon each person, firm, corporation, agent, or officer engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama, for the privilege of engaging in such business; said license or privilege tax shall be due and payable in advance on the first day of October of each year and shall be in a sum equal to two-fifths of a mill upon each kilowatt-hour of hydroelectric power manufactured and sold during the preceding calendar year.'

"The said revenue law of Alabama, approved July 22, 1927, also provides that in case said tax is not paid when due, then 15 per cent thereof shall be payable thereon as a penalty for the same not having been paid by the time it was due under said revenue law; and said act of the Legislature of the State of Alabama hereinbefore referred to provides that said tax shall be due and payable on, to wit, November 1, 1927. * * * that there has been demanded of the said United States the tax due by said Government on 439,311,000 kilowatt-hours of hydroelectric power sold by said Government to the Alabama Power Company, a corporation; and that said Government has failed and refused to pay said tax, and that said tax, not having been paid when [fol. 11] due, the said Government is liable for said tax and the interest thereon since November 1, 1927, and 15 per cent thereof as a penalty thereon for the failure to pay said tax when the same became due under the provisions of said act of the Legislature of Alabama, approved July 22, 1927.

"That during the calendar year 1926 the total amount of hydroelectric power generated by the United States at the power plant referred to in Paragraph III hereof was 432,629,000 kilowatt-hours, of which the United States used, in operating locks in aid of navigation and for lighting and power at its plant, 3,318,000 kilowatt-hours, and of which 429,311,000 kilowatt-hours were sold to the Alabama Power Company, as set forth in this amended petition.

"* * * that while the said United States may have constructed said Wilson Dam in the said State of Alabama and a hydroelectric plant at said dam in connection therewith, and may have manufactured thereat hydroelectric

power in pursuance to the national defense act (section 79, title 50, of the United States code; section 124 of the national defense act) said United States, after having manufactured said hydroelectric power, did sell the same to a corporation or an industry carried on by private capital.

" * * * that the total amount of money claimed of the United States in this suit is a tax due for the privilege exercised by said United States, of manufacturing and selling 429,311,000 kilowatt-hours of hydroelectric power sold to the Alabama Power Company, a corporation carried on by private capital, which said privilege tax amounts to approximately $173,051.60, together with interest thereon at 8 per cent per annum, and the further sum of 15 per cent thereof as a penalty thereon due on account of the failure or refusal of the United States to pay said tax when due, that is to say, November 1, 1927."

It will thus be seen that the Secretary of War leased a certain surplus amount of the gross electric current produced by this plant to the Alabama Power Company, an Alabama corporation, the balance being used by the Government for its own purposes. The State of Alabama by statute levied and attempted to collect a tax on this surplus of the gross amount of the current produced, on the basis of a sum equal to two-fifths of a mill upon each kilowatt hour of current supplied to the Alabama Power Company. It was a direct tax on a portion of the gross production of the plant measured by the amount of current supplied to the Alabama Power Company. The Government refused to pay the tax, and the State of Alabama is here asking for a judgment for the amount of the tax, with interest and a penalty for failure to pay.

The question is, Did this statute of the State of Alabama impinge upon the constitutional rights of the United States?

A tax on property is seen to be a tax on the thing called ownership, which is merely a person's legally protected interest in the thing owned.

We are of the opinion that a State can not legally tax the sale or the proceeds of a sale of its property by the United States Government, and that it what the State of Alabama has attempted to do in this case. And further:

[fol. 12] First. That in the exercise of its constitutional power the United States has the right, as Congress may deem proper, as a means of carrying into effect its constitutional powers, without being retarded, impeded, or burdened by acts of the States, to purchase property (Osborn v. United States Bank, 9 Wheat. 738, 867; Telegraph Co. v. Texas, 105 U. S. 460; Van Brocklin v. Tennessee, 117 U. S. 151; Ohio v. Thomas, 173 U. S. 276, 282; Northwestern Insurance Co. v. Wisconsin, 275 U. S. 136; Panhandle Oil Co. v. Knox, 277 U. S. 218, 221).

To hold and possess property (Van Brocklin v. Tennessee, supra; Clallam County v. United States, 263 U. S. 341, 344; Lee v. Osceola Improvement District, 268 U. S. 643, 645; and New Brunswick v. United States, 276 U. S. 547).

And the right to sell its property (Chictaw & Gulf Railroad Co. v. Harrison, 235 U. S. 292; Indian Oil Co. v. Oklahoma, 240 U. S. 522; Gillespie v. Oklahoma, 257 U. S. 501, 505; and Jaybird Mining Co. v. Weir, 271 U. S. 609, 612, 613).

Aside from the express authority given by the national defense act (see footnote) to sell and dispose of "any surplus" of the "products" of the plant, the right of the Government to dispose, by lease or otherwise, of the "products" created by the building of the dam, erected for a public purpose, was a constitutional right and the exercise of it a means of carrying into effect the constitutional power. The disposal of the "products" could be by lease or otherwise; a lease may be a sale of a right when a price is paid.

Second. That the right to sell property which it owns is the correlative of the right to buy. They mutually imply and involve one another. The right to tax one involves the right to tax the other, i. e., the purchase as well as the sale. To say that a State can tax the right to buy or the proceeds of a purchase by the Government for its legal uses and the right to sell or the proceeds of a sale by the Government of what it had purchased and owned would put the United States Government at the mercy of the State. It may be noted that this section, 124, authorizes the purchase of materials. This right of purchase could not be interfered with by a similar tax on the dealer, say, in lumber or oil who sold these materials to the United

States for the purposes of this plant. See Panhandle Oil Company v. United States, supra. The same principle must apply to the sale of materials or the products of their use, and the reach of protection for the sale must stretch as far as the purchase of materials.

Third. That no State can, by taxation or otherwise, in the exercise of its rights, in the smallest degree limit, diminish, qualify, or interfere with the exercise of these rights of the United States Government, and that a statute having this effect is unconstitutional and void as to the United States. McCulloch v. Maryland, 4 Wheat. 316, 420.

The doctrine of the immunity from taxation of the property and instrumentalities of the United States Government is that if such burdening be permitted it might result in crippling the revenues of the Government upon whose agency or instrumentality a tax was placed. The very condition thus presented prevents the power to tax from existing, and this in view, further, of the paramount nature of the governmental function under which the property [fol. 13] proposed to be taxed is held and exercised. No other doctrine has ever been held or approved by the Supreme Court.

Fourth. That if the constitutional power exists, Congress has authority to select the means and methods of carrying it into effect and to create such agencies to that end as it may see fit. In the case of Clallam County v. United States, supra, it was held that Congress could go so far in this direction as to incorporate and formally erect a new personality and corporation under the laws of the State of Washington for its convenience in accomplishing its ends, and that taxes levied by the State and county upon land and other physical properties of the corporation were unconstitutional and void.

Fifth. That where Congress has passed a statute authorizing the doing of a certain thing and the creation of a certain agency and given full authority to the Executive to accomplish that purpose, and thus expressed its opinion of its constitutional right so to do, this court will not undertake to deny the constitutionality of its action.

Sixth. That where Congress has taken the action just stated it was taken in the exercise of a public function,

and the things to be done and the agencies erected in pursuance thereof were public acts and public agencies and can not by any refinement or nice distinctions be treated as or converted into private agencies and thereby be subjected to State taxation. This being true, it follows that any sales made of property purchased or owned in connection wth the creation of said agencies or the proceeds of the operation thereof were made in the performance of a public function, in the transaction of public business, and can not by any illogical twist or the use of a false face be made to appear as private business.

Seventh. That no agency created by Congress as a means of exercising its constitutional functions can be taxed by a State, for the reason that it is an instrumentality of the United States.

It can not seriously be disputed that the Wilson Dam and the plan for generating electric current were such an agency and such an instrumentality.

Eighth. That where an agency is created and all of the agent's property is acquired and owned by the United States for the purpose of exercising a constitutional right, the taxation of its property or the sale of its property or the products thereof is a taxation of the means employed by the Government to perform a constitutional function (Weston et al. v. City Council, 2 Pet 449; Choctaw & Gulf Railroad Company v. Harrison, supra; Indian Oil Co. v. Oklahoma, supra; McCulloch v. Maryland, supra; Gillespie v. Oklahoma, supra), and so in this case the tax on the sale of current to the Alabama Power Company is a tax on the means and the agency employed by the United States to perform a constitutional function. The tax here is direct on the amount of power sold specifically and in terms authorized by the act creating the agency. Section 124 of the national defense act, 39 Stat. 166, 215, authorizes the sale of "any surplus * * * not required" for governmental use, upon such terms as the President may prescribe.

As stated, Congress assumed the constitutional power to direct, and the President was directed to do the very thing that was done in this case; that is, sell the "surplus" [fol. 14] under discretionary conditions. The act here by

the Government is spoken of as a lease, but it is clearly a sale of electrical current. If the State of Alabama has the right to tax a part of this gross current or product, it has a right to tax the whole of it in case the Government in the future should wish to sell or to lease the plant. Congress has the constitutional power to either lease or sell, and in case it should do so the proceeds of the sale or lease of the products of the plant could not be taxed any more than the proceeds of the sale of the plant itself could be taxed. This plant was bought and paid for by the Government, not as already constructed but in the sense that it paid for its construction, and the output of the plant, its product, is as much and in the same sense the property of the Government as the plant itself. It has the same right to sell one that it has to sell the other, free from interferences by a State. Van Brocklin v. Tennessee, supra, and oil and mineral cases cited supra.

Ninth. The means and agencies which Congress may select for the performance of its constitutional functions must necessarily vary and expand to suit the expanding social, economic, and political life of the people of the country.

The elastic character of the Constitution is conceded. As a piece of governmental machinery it was not intended as a stationary engine but rather as an adustable motor. As the life of a country does not and can not stand still, its constitution must yield and expand to meet its changing needs if it is to accomplish its mission of fostering and guarding that life; acting always within the confines of and with due regard to its granted and limited powers, and making suitable adjustments in the maintenance of its relations to the rights of the States as well as the welfare of all the people.

To suffer State legislation to disregard the Constitution would soon make it a dead letter and destroy its efficiency, and so the courts must be the balance wheel in the machinery of the Constitution. To admit this power in a State or permit its exercise would make a fatal breach in the walls of the Constitution. The power of the courts must be so exercised as to maintain the paramountcy of national power wthin the sphere of its competence, with due regard to the reserved sovereignty of the States. Neither must be unduly favored or promoted.

Within the circumference of its powers, the Constitution was intended to and must meet and fulfill the governmental requirements demanded by the change and growth of a vibrant and vigorous people, as its economics, sociology, and politics from time to time embody the facts and form the problems of its national life. So a part of what is the domain of so-called private business occupied by the activities of private persons today for private profit may in the interest of the general welfare of the people of the United States become by action of Congress occupied as public business tomorrow by the Government. But in invading what was formerly the domain of private business and assuming regulation or control of business activities which were formerly conducted only by individuals does not make the Government's action in so doing private business or place it in a position of conducting a private business. Whenever it lawfully enters a new field and creates a new agency in the performance of its constitutional functions the business covered by that agency and [fol. 15] its operations at once become a public business, created and carried on in the exercise of a public function. The mere fact that it may be an invasion of the domain of private business does not change its public character when assumed by the United States. This is exemplified in the case of the Post Office money-order system, the parcels-post system, the postal savings banks, the United States Shipping Board Emergency Fleet Corporation, the Panama Canal, the Alaskan Railroad, the Insular Barge Company, a corporation, from all of which the United States receives an income from charges, and the twenty or more canals, most of them intrastate, which the Government has erected and operates and for the use of which canals, as in the case of the Panama Canal, it could, if it saw fit, exact a toll. Is it to be said that in case it did the State where the canal was located could tax the gross receipts from such tolls?

More than this, the Government by lease sells the output of its mineral lands, its oil lands, its timberlands, its grazing lands, and in erecting dams in the aid of navigation or irrigation, or flood prevention, it sells sometimes the water power from these dams, as is proposed in the Boulder Dam, to States, municipalities, and private per-

sons. Are the gross proceeds of these sales or leases taxable by a State? The Insular Barge Company, a corporation, owns numerous barges and wharves and conducts a general shipping business on the Mississippi River, and is "a separate personality" and corporation, but owned and operated by the Government in aid of navigation. Can its gross receipts be taxed by a State?

The United States every year sells surplus material or used and unnecessary property which it owns, through its different departments. It sells its antiquated and useless ships, as it does its antiquated surplus and useless arms and military equipment, furniture, and personalty, as well as realty owned by it. It has but recently been engaged in an extensive sale of great quantities of surplus and useless material accumulated in the operations of the World War, and through the medium of the Shipping Board has disposed of a large number of useless ships. Through that board it is at present constructing new ships or contributing to their construction and leasing and operating those that it owns. Is it to be said that a State could tax the proceeds of the sale of all of these materials?

If what is contended for by the petitioner is a sound doctrine, it is not difficult to see how the future activities of the United States Government will be limited and the untrammeled and free use of agencies which it has created for governmental purposes in the exercise of constitutional power interfered with and possibly frustrated. The Government is just entering upon new fields of industrial endeavor which are bringing and will bring great change in the social, economic, and political life of the people, viz, the use and occupation of the air by the radio and aviation. Already the policy of the Government's taking full control of these operations in the air is being advocated, and it is not among the things impossible that this policy may not in the future be adopted. The question of Government ownership and operation of public utilities is seriously advocated by many thoughtful and patriotic persons. Once concede that the United States can engage in private business as a private personality, once throw [fol. 16] open the question for decision as to whether the United States in particular cases is or is not engaged in private business, and the field of litigation is limitless.

To concede the right of a State to tax or in any way interfere with the performance of a governmental function under the sophistical plea that it is a private business would be to open up a field for a general frustration of the United States Government in the performance of its constitutional functions by any or all of the States of the Union.

The proposition that the United States by engaging in business ordinarily conducted by individuals thereby incurs the liability of a private individual is fallacious. Under the Constitution, the United States has no authority to transact anything but public business as a governmental agency—all its acts are of a governmental character. Because it chooses, as a means of effectuating its constitutional powers, to occupy a place in business an individual could occupy with equal propriety, it would nevertheless be acting in its public and governmental character. It would be performing a function strictly belonging to its limited sovereignty as a Government in its strictly governmental capacity; performing a duty of a public character imposed upon it for the public benefit. It can not acquire and manage property or voluntarily exercise rights except for a public purpose. Its legitimate acts are public acts, not private acts. It possesses but one kind of power, namely, governmental and public, to be used only and solely for public purposes, and whatever it does in the exercise of its powers is of this character and by virtue of its granted powers of sovereignty. Whatever property it holds is public property. It can not lawfully purchase, hold, or use property in the capacity of a private individual. Its powers were granted for public purposes exclusively and belong to it in its public character. The powers were not given for the purpose of private advantage or emolument. To so use them would be an ultra vires act by its agents, for which the United States could not be taxed.

In the case of South Carolina v. United States, 199 U. S. 437, in holding that a State could engage in private business, it clearly was not intended to sweep away the ancient landmarks and the immunity from taxation of government instrumentalities of the United States by a State or to endow a State with the power to divest the Government of the United States of any of its lawful attributes. The

United States has no reserve powers of sovereignty. The States have.

The question can not be disposed of by the mere statement "that private business is private business." This is as satisfactory and convincing as saying that "public business is public business." Private business is private business only so long as it remains private business; that is, based upon the rights and activities of a private individual. It ceases to be private business and becomes public business when the things done are done in the exercise of a public function or through a public agency. To speak of the United States being engaged in private business is of a kind with speaking of private international law, albeit it has so been spoken of by certain writers, or the private judgment of a court, or a private arrest by an officer.

The United States is a government of limited and enumerated powers. There is no specially granted or implied [Vol. 17] powers to engage in private business as such. In selecting the means to carry out and perform its constitutional powers the Government may invade the field of what is called private business and to the extent that it does it is performing what it can only perform—a public function. A State by reason of its original and reserved sovereignty may engage as a separate personality or corporation in what is called "private business," and thus subject itself to certain liabilities. But when the United States enters the field of so-called private business even as a separate personality or corporation, in order to effectuate certain of its granted powers, its action in so doing is a public act and it is not liable to be treated as a private individual and be subjected to taxation as such. Clallam County v. United States, supra. The court in that case said:

"The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its own ends";

that is to say, it could invade the domain of private business in the form of a private corporation for its own convenience and to carry out its own ends, yet it would not be conducting business in a private capacity but as a governmental agency and so be exempt from taxation.

In the Chandler Dunbar case, 229 U. S. 53, 73, the court said:

"If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government."

See also to the same effect Waters v. Phillips, 284 Fed. 237, 239. There can be no logical distinction between the principle involved in these two cases and the instant case as far as the question of the right of the Government to dispose of water power or electrical current is concerned. The tax levied by the State of Alabama clearly interferes with, impedes, and burdens the exercise of this right and is therefore unconstitutional.

In McCulloch v. Maryland, 4 Wheat. 316, 421, the court said:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited * * * are constitutional."

The fact that this plant was located within the jurisdiction of the State of Alabama is of no significance. The United States Government did not go into the State of Alabama and build this plant. It was already there. It had a constitutional right to be there. It was placed there by the Constitution and with the consent of the States. It has always been and is in every State of the Union and wherever its flag has a right to fly. Its authority is ubiquitous and, within the limits of constitutional powers, is paramount in every State of the Union. It has no fixed residence or domicile from which it goes forth into the different States to perform its functions and conduct its business. Within the physical bounds of its sovereignty, there it is and there it has been.

The demurrer should be sustained and the petition dismissed, and it is so ordered.

Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 18] GREEN, Judge, concurring in the result:

I concur in the result of the foregoing opinion, but on somewhat different grounds. On account of the importance of the principles which have been considered and discussed on the submission of the case and in view of the fact that the decision may be a precedent in other similar cases, I have deemed it advisable to express my opinion thereon at some length.

The Federal Government undoubtedly has the right to acquire, own, and use properly independently of its war powers, but this right and power is not derived from any provision in the Constitution, for the Constitution makes no reference to it. It has this power, as I think, because it is one of the inherent rights and attributes of sovereignty. In Van Brocklin v. Tennessee, 117 U. S. 151, 154, cited and relied upon in the majority opinion as a leading case, the court said: "The United States, for instance, as incident to the general right of sovereignty," may do certain things; and it adds: "So the United States, * * * may acquire and hold real property in any State, whenever such property is needed for the use of the Government in the execution of any of its powers." In fact, the right and power to own and hold property is such an essential element of sovereignty that no government could be successfully carried on without it. The right and power to own, however derived, necessarily includes the right to use and the right to sell, for no ownership would be complete without these rights, and if the Government has the right to use its property it necessarily has the right to sell this use, or, in other words, to lease the property. These powers so necessary to every government are obviously a governmental function, and as such can not be impaired or controlled by State taxation.

Having stated these principles upon which I think nearly everyone will agree, it becomes necessary to notice the allegations of the petition which are, so far as necessary to be stated for the consideration of the point next to be taken up, "that the said United States has sold to the Alabama Power Company during the calendar year of 1926" a certain amount of hydroelectric power developed by the Wilson Dam, and "that since October 1, 1927, and

continuously up to and including this date, said United States has exercised the privilege of manufacturing and selling hydroelectric power in the State of Alabama to the Alabama Power Company." Whether the State legislature recognized its limitations in the way of taxation or not, the State statute upon which the case of the State depends provided that—

"* * * there is hereby levied a license or privilege tax upon each person, firm, corporation, agent, or officer engaging "in the business of manufacturing and selling hydroelectric power in the State of Alabama, for the privilege of engaging in such business; * * *."

This provision was followed by one with reference to the rate of the tax, which does not need to be considered.

It will be observed that the tax is on the privilege of engaging "in the business of manufacturing and selling hydroelectric power," but the allegations of the petition show that the United States did not engage in such business. What it did was to sell electric power produced by the Wilson Dam to a single corporation. Whether the elec- [fol. 19] tric current was sold in separate lots, or whether a continuing contract was made which would in effect be a lease, does not appear from the petition nor, as I think, is it material. In neither case would the Government be engaged in the business of manufacturing and selling hydroelectric power any more than a farmer would be engaged in the grain business because he sold at various times different kinds of grain, which were the products of his farm. If the word "business" was used in the statute in its commercial sense, as I think it was, the Government was not making a business of creating and selling power. I think it is clear that the acts of the Government alleged and set forth in the petition do not come within the provisions of the Alabama statutes.

The conclusion above stated would by itself dispose of the case, but for the reasons given at the beginning of this opinion I deem it advisable to state my views on some other points where my conclusions are not in harmony with the majority opinion.

I am unable to agree to the statement in the majority opinion that the sale of hydroelectric power was author-

ized by the act under which the Wilson Dam at Muscle Shoals was constructed. It seems to me that a reading of its provisions shows clearly that in a general way it was enacted for war purposes, and specifically to enable the Government to produce nitrates which are so necessary in modern warfare. For this purpose the President was authorized to construct dams, locks, etc., "as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products." The third paragraph of section 124, from which section the part above quoted is taken, provides that "the products of such plants shall be used by the President for military and naval purposes," and that "any surplus which he shall determine is not required shall be sold and disposed of by him." All of these provisions were plainly within the constitutional authority of Congress and it is equally true that they provide for the exercise of a governmental function, namely, preparation for war, but I am unable to find anything in the act which either authorizes or shows it was contemplated that use should be made of the power produced for any other purpose except that of the Government itself. The act authorized the construction of "power houses, and other plants * * * for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers." The President was further authorized to use "the products of such plants * * * for military and naval purposes, * * * and any surplus which he shall determine is not required shall be sold." Where the wording of the act is considered, I think it is clear that the word "products" refers to nitrates, a product necessary for the manufacture of high explosives and extremely useful as a fertilizer in the way of increasing the amount of food crops grown, which was also necessary in time of war. In this connection it should also be said that when the national defense act came before Congress, nothing was said either in the committee report or in discussion of the measure with reference to the production of hydroelectric power for sale. I do not, however, consider this point as important because Con-

gress having authority to authorize the construction of [fol. 20] the dam, and the Government having acquired the dam as its property, the United States would, I think, without any provision in the act, have the powers concerning its sale and use which have been herein above recited. On the other hand, if, in the use made of the dam, it went beyond its governmental powers, no provision in the act would add to its authority.

In the majority opinion it is stated that private business "ceases to be private business and becomes public business when the things done are done in the exercise of a public function or through a public agency." If by this is meant that acts done for the public benefit or through a public agency by the National Government thereby become a governmental function, I am unable to concur. To my mind, whatever is private business when done by a State would be private business when done by the United States. Leaving out the question of whether the Government may carry on what in the strict sense of the term is private business, the question of whether such business, if done, is taxable must depend upon the powers conferred upon the Government by the Constitution or existing by reason of the fact that the Constitution has created a sovereignty with certain inherent powers; but in all cases, as it seems to me, some governmental function must be performed in order that the exemption from taxation may be maintained.

It is said that the Government has in many instances engaged in private business, such as the operations of the Post Office Department, the Emergency Fleet Corporation, the Panama Canal, the Alaskan Railroad, and the Insular Barge Company, together with a number of Government canals for which the Government could charge tolls if it desired, and it is asked whether a tax could be levied by a State upon the business thus carried on or upon the receipts from such operations. Certainly not, but the reason is plain. All of these acts are authorized by special provisions of the Constitution. The Constitution authorizes Congress to regulate commerce with foreign nations and between the States, and to regulate in the sense intended means not merely to control but also to foster, maintain, or make more efficient by any appro-

priate means. Second Employers' Liability Cases, 223 U. S. 1, 47, 48. Congress also has complete power over the Territories. In all of these matters, by giving Congress authority to act, the Constitution made such acts a governmental function of the Government of the United States, and this, as I think, shows that these matters are exceptions to the general rule.

Clallam County v. United States, 263 U. S. 341, was, as gress might create a corporation for convenience in carrying out certain governmental functions, and that a tax levied by the State upon the property of the corporation was unconstitutional. But this is just another way of saying that when the Federal Government makes use of some instrumentality for carrying on a governmental function, which in the case at bar was obtaining materials for use in war, the instrumentality stands in the same position as the Government itself and can not be taxed. An examination of the decision will show that the Supreme Court confined its ruling to cases where some governmental function was being exercised and where the use of public property was confined to such purpose. The court called attention to the [fol. 21] fact not only that the corporation taxed had been organized as an instrumentality for carrying on the war, but when the war was over its work was stopped except so far as was necessary to go on in order to wind up its affairs, and that whatever assets were realized would go to the United States. The same principle that gave the Government the right to use this corporation and its property for war purposes gave the Government the power to close out and dispose of the property which it held. In so doing a governmental function was being exercised.

In the case of South Carolina v. United States, 199 U. S. 437, the Supreme Court said that—

"• • • whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation";

and also,

"• • • that the license taxes charged by the Federal Government upon persons selling liquor is not invalidated by the fact that they are the agents of the State which has itself engaged in that business."

I think the principle which is involved in this statement applies equally to activities on the part of the National Government, and if the National Government was engaged in a business of creating and selling electric power for all persons who should apply therefor and not simply disposing of surplus power for which it had no use and which would otherwise go to waste, by a sale or lease to a single company, that a very different situation would be presented, for, in my judgment, it would not be carrying out any governmental function or doing any act which was necessary in order that a governmental function might be fully exercised. I am unable to see how such action would be necessary in order that the Government might manufacture nitrates or prevent waste of public property. It is quite clear under the decision in the South Carolina case, supra, that a State could not so act without making itself subject to Federal taxation, if a tax was imposed, and in this connection it ought to be said that while there was a dissenting opinion in the South Carolina case, the doubt in that case arose, as I understand the dissenting opinion, not as to the general principle that the State could not engage in private business and claim exemption from the taxation, but from the fact that in that particular case the State was engaged in the execution of a police power and thus carrying on a public and governmental function, as it had the undoubted right and power to do. It has been generally considered that the same limitations applied to both the Federal and State Governments in that neither could tax the property or instrumentalities of the other. Numerous Supreme Court decisions could be cited which have so held in effect, and in some cases almost literally. If the Government can carry on a private business merely because it uses its own property or some instrumentality created for the purpose of carrying on a governmental function, this time-honored principle must be laid aside and a conclusion reached that there is one rule for the Federal Government and a different rule for the State governments. Let us see what would be the result.

The Government has manufacturing plants, such as the big gun factories at Watertown, Watervliet, and Rock Island. If work for these plants was slack or entirely lack- [fol. 22] ing, could the Government sell its power or use its machinery, when adaptable for the purpose of entering

into the commercial field, in competition with private industry without in any manner being subject to a tax? The Government has at its navy yards at Brooklyn and Mare Island, California, plants fully equipped for the construction of steamships of the largest size. In these plants large sums of money have been invested. They are used for the repair and construction of war vessels or other Government boats or ships. The demand for large vessels is not continuous, and for considerable periods of time little use is made of the construction features of these navy yards. As the overhead occasioned by these plants goes on continuously, the Government could probably lessen the cost to the taxpayer if these yards were used in the construction of merchant vessels in competition with private yards. The plant having been constructed for a governmental function, could the Government carry on this private work without being subject to any tax? The Government owns dredges used in aid of navigation. When these dredges are idle could the Government put them at work on private contracts and be exempt from tax? They were bought or constructed to perform a governmental function. So also the Government may construct, if it sees fit, bakeries at its cantonments for the purpose of supplying its Army with food. If the troops are moved away from the cantonment, could the Government continue to buy flour, operate the bakery, and sell its products to private individuals in the neighborhood of its location and be protected from taxation? I think not, although in all these hypothetical cases the Government would be using an instrumentality created for a governmental purpose; but these questions, as it seems to me, must be answered in the affirmative if the rule in favor of the Federal Government is as broad and comprehensive as the majority opinion implies, and in this I am unable to concur.

It is sometimes said that a distinction can be found in the fact that the Federal Government has only powers which are expressly conferred upon it by the Constitution or those which, as I have stated, are inherent in the sovereignty which was created by the Constitution, while the States have such powers as are not reserved to the Federal Government by the Constitution. But this, as it seems to me, does not alter the fact that as long as either is acting within

the limitations so prescribed it is exercising a constitutional right and power. In my opinion the principle, that both the National and State Governments are subject to the same limitations with reference to taxation, should be maintained.

[fol. 23] VII. JUDGMENT

At a Court of Claims held in the City of Washington on the 12th day of March, A. D. 1930, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition; on consideration whereof the court is of opinion that the demurrer is well taken:

It is therefore adjudged and ordered that the defendant's said demurrer be sustained and that the plaintiff's amended petition be and the same is hereby dismissed.

[fol. 24] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,948. Court of Claims. Term No. 817. The State of Alabama, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed April 15, 1930. File No. 34,948.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

MAY 8 1938

SUPREME COURT OF THE UNITED STATES

No. 82

THE STATE OF ALABAMA, PETITIONER,

VS.

THE UNITED STATES.

BRIEF OF PETITIONERS ON PETITION FOR CERTIORARI.

By

CHARLIE C. MCCALL,
Attorney General of Alabama.

A. A. EVANS,
Assistant Attorney General of Alabama.

THOS. E. KNIGHT, JR.,
Special Assistant Attorney General of Alabama.

BROWN PRINTING CO., MONTGOMERY, 1938

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BRIEF OF PETITIONER

STATEMENT OF THE CASE

This suit was brought by the State of Alabama to enforce collection from the United States of a license or privileeg tax imposed by the State of Alabama upon the business of manufacturing and selling hydro-electric power within the State of Alabama.

The Legislature of the State of Alabama passed a revenue law, approved July 22, 1927, (General Acts of Alabama (fol. 2) 1927, Pages 139 et seq.), which provides, among other things, as follows:

"Section 1. Every person, firm, company, corporation or association engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act or any other Act. * * *"

Section 2D. In addition to all other taxes of every kind now imposed by law or otherwise imposed by this Act, there is hereby levied a license or privilege tax upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydro-electric power in the State of Alabama for the privilege of engaging in such business; said license or privilege tax shall be due and payable in advance on the first day of October of each year, and shall be in a sum equal to two-fifths of a Mill (2/5) upon

each kilowatt hour of hydro-electric power manufactured and sold during the preceding calendar year. * * *

Section 72. * * * in all proceedings under this Act, the license due October 1st shall not be delinquent before the first day of November of each year. * * *

During the calendar year 1926, the United States manufactured approximately 432,629,000 kilowatt hours of hydro-electric power at Wilson Dam in the State of Alabama, of which it sold approximately 429,311,000 kilowatt hours to the Alabama Power Company, a corporation carried on by private capital, and the remainder it used for its own purposes. Since October 1, 1927, and continuously up to and including the date that the petition was filed in this case, the United States has exercised the (fol. 3) privilege of manufacturnig and selling hydro-electric power in the State of Alabama to the Alabama Power Company.

The State of Alabama assessed and made demand upon the United States for the payment of the tax imposed by the Act of July 22, 1927, on account of the manufacture of approximately 429,311,000 kilowatt hours and the sale of the same to the Alabama Power Company, in the amount of approximately $173,051.60, but the United States refused to pay the tax. This suit was brought for the collection of that sum, together with interest thereon at eight per cent per annum.

A demurrer to the petition was interposed by the United States and was sustained by the Court of Claims in its decision rendered March 12, 1930. (Record, pages 1 and 2.)

SUMMARY OF POINTS

Argued by Petitioners

1. Jurisdiction of the Supreme Court.

2. The State and Federal Government are equal in their respective scopes of taxing power.

3. The Federal Government, in engaging in a business of a private nature as an incident to the exercise of an implied power under the Constitution, is not cloaked with an immunity from taxation by a State to the same degree that it would be if engaged in performance of an immediate and direct sovereign power.

4. A tax levied upon that hydro-electric power manufactured and sold by the Federal Government does not hamper or cripple the Federal Government in the performance of a governmental function to the same extent that immunity from taxation interferes with the exercise by the State of its taxing power.

ARGUMENT

Opinion of the Court of Claims

The opinion in this case has not been officially reported. The case was decided by the Court of Claims March 12, 1930, and the opinion of the Court appears at pages 9 to 30, inc., of the printed record.

Jurisdiction of the Supreme Court

Judgment of the Court of Claims was rendered March 12, 1920 (R. 30). Petition for certiorari was filed April 15, 1930, (R. 30).

Jurisdiction to issue the writ is conferred upon this Court by Section 3(b) of the Act of February 13, 1925, (Chap. 229, 43 Stat. 936, 939).

Under the above mentioned Section of Chapter 229, (43 Stat.) writ of certiorari was awarded in the case.

Leonard vs. United States, 279 U. S. 40.

THE STATE AND FEDERAL GOVERNMENT ARE EQUAL IN THEIR RESPECTIVE SCOPES OF TAXING POWER.

The two governments are upon an equality. The power of taxation by the states was not abridged by the grant of that power to the Federal Government.

The Federal Government's immunity from taxation, levied by the State, is no more absolute than the same immunity of the State.

The Collector vs. Day, 11 Wall. 113, 20 L. Ed. 122.

THE FEDERAL GOVERNMENT, IN ENGAGING IN A BUSINESS OF A PRIVATE NATURE AS AN INCIDENT TO THE EXERCISE OF AN IMPLIED POWER UNDER THE CONSTITUTION, IS NOT CLOAKED WITH AN IMMUNITY FROM TAXATION, BY A STATE, TO THE SAME DEGREE THAT IT WOULD BE IF ENGAGED IN PERFORMANCE OF AN IMMEDIATE AND DIRECT SOVEREIGN POWER.

Unquestionably the manufacture for the purpose of and the sale of hydro-electric power by the Federal Government to the Alabama Power Company is an undertaking in the nature of a private enterprise.

While it is true that the Government uses 3,000,000 kilowatt hours of the electricity generated, in its operation of the locks at Wilson Dam in aid of navigation, and in the maintenance of the plant, yet the sale of 429,000,000 kilowatt hours is purely a commercial enterprise. The tax is sought only on that amount of the power sold.

If the State attempted to tax that power used by the Government in the performance of its ordinary functions, of course, the decisions of this Court heretofore, would be applicable.

McCullough vs. Maryland, 4 Wheat. 316 et seq., 4 Law. Ed. 579, 606.

Panhandle Oil Co. vs. Knox, 277 U. S. 218, 221.

But the tax is not so imposed.

Could it be contended that the Federal Government could escape a tax upon a sale of gasoline on the theory that it needed a certain amount of gasoline for governmental purposes?

There can be no distinction drawn between the sale of this power by the Federal Government and the dispensation of whiskey by the State of South Carolina as an incident to the exercise of its police power.

South Carolina vs. United States, 199 U. S. 437, 50 L. Ed. 261.

A TAX LEVIED UPON THAT HYDRO-ELECTRIC POWER MANUFACTURED AND SOLD BY THE FEDERAL GOVERNMENT DOES NOT HAMPER OR CRIPPLE THE FEDERAL GOVERNMENT IN THE PERFORMANCE OF A GOVERNMENTAL FUNCTION TO THE SAME EXTENT THAT IMMUNITY FROM TAXATION INTERFERES WITH THE EXERCISE BY THE STATE OF ITS TAXING POWER.

Sovereign immunity from taxation exists because of the doctrine of non-interference by one sovereignty with another engaged in the performance of its ordinary function.

To remove a commodity or an enterprise from the legitimate field of taxation of a government is certainly an interference with that government. It has been held that such claim of immunity may hamper or cripple a sovereignty to a greater extent than the burden of a reasonable tax.

Metcalf et al. vs. Mitchell, 269 U. S. 514.

The tax imposed in the instant case should not and does not unreasonably hamper the Federal Government in the exercise of an immediate and direct sovereign power.

Metcalf et al vs. Mitchell, supra.

In the *Panhandle Oil Company vs. Knox case,* cited *supra,* this Court recognized the right of a dealer to pass a sales tax to the consumer, when it was held that the tax in that instance was a hindrance to the Federal Government in the performance of its governmental functions.

Since the tax in the instant case can be passed to the purchaser of the power manufactured by the Government it can not interfere with the Federal Government to the extent that the removal of that field of taxation from the taxing power of the State interferes with the exercise of an immediate and direct sovereign power of the State.

Metcalf vs. Mitchell, supra.

We respectfully submit that the writ of certiorari should be awarded.

CHARLIE C. MCCALL,
Attorney General of Alabama.

A. A. EVANS,
Assistant Attorney General.

THOS. E. KNIGHT, JR.,
Special Asst. Attorney General.

I hereby certify that I have this day mailed to the Honorable George H. Foster, Attorney for the United States in the above mentioned case, a copy of the foregoing brief and argument, postage prepaid.

This the 2nd day of May, 1930.

THOS. E. KNIGHT, JR.,
Special Asst. Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. ~~814~~ 82

THE STATE OF ALABAMA, PETITIONER,

VS.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY MEMORANDUM FOR THE STATE OF ALABAMA IN SUPPORT OF PETITION FOR THE WRIT.

CHARLIE C. MCCALL,
Attorney General of Alabama.

A. A. EVANS,
Assistant Attorney General.

THOS. E. KNIGHT, JR.,
Special Asst. Attorney General.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 817.

THE STATE OF ALABAMA, PETITIONER,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY MEMORANDUM FOR THE STATE OF ALABAMA IN SUPPORT OF PETITION FOR THE WRIT.

In its memorandum on the petition for a writ of certiorari to the Court of Claims, the United States asserts that it would not oppose a review of the questions presented in the petition for certiorari if it were not for the belief of the United States that the Court of

Claims erred in taking jurisdiction of the case, and the United States suggests the advisability of a dismissal or denial of the petition expressly upon the ground of want of jurisdiction of that Court.

In view of the short time intervening before the date on which this petition will be submitted, it is manifestly impossible for the petitioner to brief adequately the question of jurisdiction of the Court below, which question is now raised by the respondent for the first time.

This reply memorandum is therefore filed for the purpose of presenting to the Court a brief statement of authorities in support of that jurisdiction and for the purpose of praying that the Court grant the writ and reserve consideration of this question until the hearing on the merits.

It is true, as asserted by the United States, that this Court in *Lane County v. Oregon,* 7 Wall. 71, held that, in statutes making United States notes a legal tender for debts, Congress did not intend to include within the term "debts" taxes imposed by State authority; and, in *Meriwether v. Garrett,* 102 U. S. 472, that the creditors of a municipality could not enforce in equity the collection of taxes levied by the municipality. But neither of the cases cited is authority for the proposition that an action brought by a State to collect a franchise tax from a taxpayer is not a claim founded upon an implied contract, within the meaning of Section 145 of the Judicial Code. On the contrary, this Court, in *United States v. Chamberlin,* 219 U. S. 250, 262, expressly held that *Lane County v. Oregon* and *Meriwether v. Garrett* did not involve the question whether an action in debt brought by the sovereignty imposing the tax, to recover a tax due and unpaid, could be maintained.

In fact, it has long been held that actions of assumpsit for the collection of taxes are proper in all cases where another remedy has not been made exclusive:

United States v. Washington Mills, Fed. Cas. 16,647, cited with approval in *United States v. Chamberlin, supra,* p. 260.
United States v. Minneapolis Threshing Machine Co., 229 F. 1019.
Winter v. City of Montgomery, 79 Ala. 488.
State v. Fleming, 112 Ala. 179.

Furthermore, where a statute imposes the duty to *pay* a tax, a personal obligation is thereby created from which the law will imply a promise; and an obligation so created may be enforced by an action in debt or assumpsit:

United States v. Chamberlin, supra, p. 263.
Stockwell v. United States, 13 Wall. 531.
Billings v. United States, 232 U. S., 261, 287.
United States v. Great Falls Mfg. Co., 112 U. S. 645.

Where there is a valid obligation on the part of the United States to pay a sum certain, and no particular remedy has been provided, the general laws which govern the Court of Claims should be resorted to for relief, if any can be found applicable to such a case.

United States v. Kaufman, 96 U. S. 567.

Objection to the jurisdiction of the Court below should be considered only on the merits.

Nelson v. Leland, 22 How. 48.
Canter v. American & Ocean Insurance Co. of N. Y., 2 Pet. 554.

CONCLUSION.

It is, therefore, submitted that the absence of jurisdiction of the Court of Claims is not clear, as contended by the United States, but on the other hand there is at least respectable authority establishing such jurisdiction; that the question of whether or not the Court of Claims has jurisdiction is an important question which should be considered by this Court and should not be made the basis for a denial of the writ of certiorari in a case where a State is seeking to enforce a liability against the federal government; and that the petitioner should have an opportunity to be heard upon this question.

Respectfully submitted,

CHARLIE C. MCCALL,
Attorney General of Alabama.

A. A. EVANS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 82.

STATE OF ALABAMA,
Petitioner,
v.
THE UNITED STATES.

BRIEF OF PETITIONER.

CHARLIE C. McCALL,
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IN THE

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OCTOBER TERM, 1930.

No. 82.

STATE OF ALABAMA,
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v.
THE UNITED STATES.

BRIEF OF PETITIONER.

Opinion of the Court of Claims.

This case was decided by the Court of Claims, March 12, 1930, (R. 30). The decision of that Court is reported at 38 Fed. (2d) 897.

Jurisdiction of This Court.

Judgment of the Court of Claims was rendered March 12, 1930 (R. 30). Petition for certiorari was filed April 15, 1930 (R. 30). The petition was granted

by this Court on June 2, 1930. Jurisdiction to issue the writ is conferred upon this Court by section 3 (b) of the Act of February 13, 1925 (43 Stat. 936, 939, Ch. 229).

Statement of the Case.

This suit was brought by the State of Alabama to enforce collection from the United States of a license or privilege tax imposed by the State of Alabama upon the business of manufacturing and selling hydro-electric power within that State.

The Congress of the United States in 1916, enacted the National Defense Act, which was approved by the President on June 3, 1916 (Ch. 134, 39 Stat. 166). The provisions of Section 124 of that Act, entitled "Nitrate Supply" are set forth in full in the appendix of this brief.

The intent of Congress in enacting Section 124 of the National Defense Act is set forth in Report No. 297 of the Committee on Military Affairs, 64th Congress, 1st Session, submitted March 6, 1916, with H. R. 12756, which was enacted as the National Defense Act. The explanation of the Committee appeared at pages 9 to 14 of this report. The Senate committee which reported the same bill made no formal report, and the conference report set forth nothing with respect to the purpose of the Act in regard to this power project. Therefore, the intent of Congress is wholly to be derived from Report No. 297.

Report No. 297 shows that the main purpose of Congress in enacting Section 124 was to provide for the authorization of a plant or plants for the manufacture of nitrogen through the air-fixation process, in order to supply the country with powder, and to make it independent in time of war of every foreign source of

nitrogen. Nitrate was obtainable only from two sources —from nitrate from the deserts of Chile, and from the atmosphere which surrounds the earth. An inferior enemy navy could make it impracticable to transport nitrate from Chile, so the establishment of a plant for the production of nitrate from the air was of first importance. The air-fixation process required a great quantity of water power for use in generating the electric energy needed in that process. The establishment of the nitrogen industry was deemed to be of the greatest benefit to the country as a certain source of powder in time of war, and as a great advantage to the agricultural industry in time of peace, through the use of nitrate in the making of fertilizer.

In accordance with the provisions of Section 124, the United States, prior to the period covered by the proposed tax, constructed a dam across the Tennessee River at Muscle Shoals, in the State of Alabama, known as Wilson Dam, and built a power plant in connection with Muscle Shoals which is used by the United States in manufacturing and developing hydro-electric energy. During the calendar year 1926 there were generated in this power plant 432,629,000 kilowatt hours of hydro-electric power, of which the United States used in the operation of locks in aid of navigation, and for lighting and power at its plant, 3,318,000 kilowatt hours. During that year it sold to the Alabama Power Company, a corporation, the remaining 429,311,000 kilowatt hours (R. 6, 7).

The legislature of the State of Alabama passed a revenue law, approved July 22, 1927 (General Acts of Alabama, 1927, pages 139 et seq.), the pertinent provisions of which are also set forth in the appendix to this brief (R. 6).

Since October 1, 1927, and continuously up to and including the date on which the petition was filed in this case, the United States has exercised the privilege of manufacturing and selling hydro-electric power in the State of Alabama to the Alabama Power Company (R. 6).

The State of Alabama assessed and made demand upon the United States for the payment of the tax imposed by the Act of July 22, 1927, due October 1, 1927, measured by the manufacture and sale of approximately 429,311,000 kilowatt hours during the calendar year 1926, the tax amounting to approximately $173,051.60, but the United States refused to pay the tax (R. 6, 7). This suit was brought for the collection of that sum, together with interest thereon at eight per cent. per annum, as provided for by Section 3056 of the Code of Alabama of 1923, which section is set forth in the appendix. In the petition the State of Alabama claimed a penalty of fifteen per cent. for failure of the United States to pay the tax when due. The State now recedes from its claim to the penalty.

A demurrer to the petition was interposed by the United States (R. 8), and was sustained by the Court of Claims in its decision rendered March 12, 1930 (R. 30). On June 2, 1930, this Court granted the application of the petitioner for a writ of certiorari to the Court of Claims.

Specification of Errors.

The Court of Claims erred in holding as follows:

(a) That where the Federal Government as an incident to the exercise of an implied power under the Constitution, engages in a business of a private nature, it is cloaked with immunity from taxation by the State

to the same degree that it would have been if engaged in the performance of an immediate and direct sovereign power.

(b) That where the Federal Government engages in a business of a private nature connected only remotely with the performance of a governmental function, the imposition of a privilege tax upon such business by the government of the State within which the business is carried on tends to hamper or cripple the United States in the exercise of a governmental function.

(c) That the manufacture and sale by the Federal Government to a private corporation of hydro-electric power in the State of Alabama was an immediate and direct exercise of a sovereign power.

Summary of Argument.

In the exercise of granted powers by the Federal Government and of reserved powers by a State, the two sovereignties are upon an equality. *Collector v. Day*, 11 Wall. 113, 126, 127; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 521; *Texas v. White*, 7 Wall. 700, 725.

Whenever the Federal Government engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the State within which the business is carried on. *South Carolina v. United States*, 199 U. S. 437; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 157; *Bank of North Dakota v. Olson*, 33 Fed. (2d) 848.

Particularly is this true where the levying of the tax will not hamper or cripple the Federal Government in the direct and immediate performance of an essential governmental function. *Osborn v. United States Bank*, 9 Wheat., 740, 860, 866-7, 868; *National Bank v. Commonwealth*, 9 Wall. 353, 362; *Metcalf & Eddy v. Mitchell, supra*, 522, 523-4.

Argument.

The State of Alabama in this case seeks to uphold its tax by presenting for the consideration of this Court certain simple premises, and if they are sound as principles of constitutional law the tax will stand, otherwise the tax will fail. These premises are: That the governments of the United States and the States are upon an equality; each within its own domain is supreme; in respect to the reserved powers of a State the State is as sovereign and independent as the general government; that the United States may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, in the same measure that a State may not, in the exercise of its powers, prevent the United States from discharging its proper functions; that the two governments, National and State, being equal, are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers; that when a State engages in activities which fall within the domain of the national taxing power the State may be taxed by the United States, and, conversely, when the United States engages in activities which fall within the domain of the States' taxing power, the States may tax the United States; that the equality of the governments of the United States and a State may be preserved, and that the one may be prevented from encroaching upon the other, only if the limits of the powers of each are determined by the same rule of construction; that the sound rule of construction, and the only rule which will maintain the balance between the two kinds of government, is that the limits of the powers of either government must be determined reasonably, so that either government must bear in equal measure the inconveniences which may re-

sult from the exercise by the other government of its true constitutional powers.

In *McCulloch v. Maryland*, 4 Wheat. 316, 410, Chief Justice Marshall said:

> "In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

In *Collector v. Day*, ( ) *supra* ( ), 124, Mr. Justice Nelson repeated the principle in this language:

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved', are as independent of the general government as that government within its sphere is independent of the States."

In *South Carolina v. United States*, *supra*, 448, Mr. Justice Nelson stated:

> "* * * We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the

> National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty."

Under the first clause of Section 8 of Article I of the Constitution of the United States, Congress is given the power to provide for the common defense of the United States. It is admitted that the National Defense Act was enacted as a measure providing for the common defense of the United States. It is admitted that the State of Alabama has no power to tax or otherwise interfere with the production of nitrates for use in making explosives at Muscle Shoals, or to tax or otherwise interfere with the production of hydro-electric power used in the production of nitrates for use in making explosives. The State of Alabama has not sought to tax any hydro-electric power used in the production of nitrates for the making of explosives. During the period covered by this suit no nitrates were manufactured. However, the State is not claiming its tax upon the portion of the hydro-electric power used by the United States in aid of navigation in the operation of the locks at Wilson Dam, or the power used in connection with its plant and equipment at Wilson Dam. The State is seeking to impose its privilege tax only upon the sale of power in ordinary commerce. While the proportion of the total power sold to the Alabama Power Company was more than ninety-nine per cent of the whole, the tax is not being asserted against that part of the power which was used by the United States for its own purposes, whatever they might be.

The State of Alabama admits that the President of the United States had the right to sell the surplus power

which represented the excess above the Government's requirements. Whether or not the President was given authority under Section 124 of the National Defense Act to sell the surplus power, he would have that authority without specific Congressional enactment. *Chandler-Dunbar v. United States*, 229 U. S. 53. Therefore, while not contesting the right of the United States to sell the surplus power, the State denies the right of the United States to manufacture and sell the power free from the tax of the State.

The statute of Alabama imposing this tax is not a discriminatory enactment; it is not directed against the United States; it applies equally to every manufacturer and seller of hydro-electric power. The volume of hydro-electric power sold by the United States to the Alabama Power Company during the period embraced by this suit was very large. It is a matter of importance to the State to collect this tax.

Is it a matter of importance to the United States to escape the tax? We believe it is not. In the first place, it is quite possible that the tax may have been passed on to the Alabama Power Company in the rate agreed upon as the contract price; but if the rate thus agreed upon did not contemplate the passing of the tax to the Alabama Power Company, the tax merely adds an additional expense item to the operation.

In the case of *South Carolina v. United States, supra*, the United States imposed its internal revenue tax upon the selling of liquor by the State of South Carolina under its dispensary system. South Carolina claimed immunity from the tax upon the ground that in selling liquor through its dispensary system it was acting wholly within its constitutional powers, in fact acting specifically under its police power. This Court held,

nevertheless, that when the State, even though acting under an unquestioned power inhering in it, engaged in a private busiess, the exercise of which was within the proper domain of taxation by the United States, the State must pay the tax for engaging in that business. The opinion pointed out that if the State could engage in the selling of liquor free from the national tax, it could engage in the selling of tobacco with a like immunity, and, in fact, in every business which fell within the internal taxing power of the United States, and likewise it could engage in importations free from tax. In the same way every State might engage in similar enterprises and activities, as the result of which the United States would be deprived of its sources of revenue.

This Court held as it did in the *South Carolina* case, not because of the loss of revenue to the United States which would result if the State of South Carolina were held to have the right to sell liquor free from tax, but because of the principle involved, and the embarrassment which would be suffered by the United States if a course of conduct should be established for the States which they might pursue to the limit. The Court recognized that a borderline must be established over which no State might step, and it drew the borderline for the benefit of the United States in the *South Carolina* case. The oft reiterated principle of the equality of the State and National Governments, in our view, gives the State of Alabama the right to ask that a similar borderline be drawn in this case for its benefit.

The tax paid by South Carolina constituted undoubtedly an inconvenience, but that State was made to bear the inconvenience so that the proper domain of the national taxing power might not be violated. In the instant case the imposition of the hydro-electric tax by

the State of Alabama upon the United States for power sold to the Alabama Power Company constitutes at the most an inconvenience, but the same rule of construction that imposed the tax upon South Carolina should in this case impose the tax upon the United States.

The majority opinion in the Court of Claims in the instant case is based upon a premise which, if carried to its logical conclusion, would wholly destroy the balance between the system of National Government and the system of State Government. The pith of the opinion is as follows (R. 18):

> "Whenever it" (the United States) "lawfully enters a new field and creates a new agency in the performance of its constitutional functions the business covered by the agency and its operations at once become a public business, created and carried on in the exercise of a public function. The mere fact that it may be an invasion of the domain of private business does not change its public character when assumed by the United States."

This pronouncement is warranted by the opinion in *McCulloch v. Maryland, supra*, but is not warranted by the subsequent decisions of this Court narrowing and limiting the statements of Chief Justice Marshall in that case.

The language of *McCulloch v. Maryland, supra*, 420, 421, 430 to 433, is indeed sweeping. It states that the question is one of supremacy; that if the States may tax one of the means employed by the National Government they may tax all of the means employed by that Government (432, 433). But the Court had a broader purpose in the *McCulloch* decision than to decide merely that the Bank of the United States could not be taxed. It wished to settle once and for all the principle that under the

Constitution the National Government was entitled to exercise implied powers to make effective its enumerated powers. It is probable that this broader purpose overshadowed the cause then particularly under consideration. This may be assumed from the fact that, shortly after the *McCulloch* opinion was promulgated, Chief Justice Marshall, speaking for this Court in *Osborn v. The Bank of the United States, supra*, 859, 860, indicated that his language in the *McCulloch* case had been too sweeping. He admitted that if the Bank were a private corporation, the principal object of which was individual trade and individual profit, the mere casual circumstance that it was employed by the Government in the transaction of its fiscal affairs would not exempt it from taxation by a State. The all embracing language of *McCulloch v. Maryland* has been further very greatly restricted by the later decisions of this Court, particularly by *South Carolina v. United States, supra, National Bank v. Commonwealth, supra*, and *Metcalf & Eddy v. Mitchell, supra*.

We do not mean that this Court has in any way departed from the primary principles announced in the *McCulloch* case in connection with the question at issue therein; that is, the question whether or not the Bank of the United States, a central bank of issue, but incidentally engaged in making loans and accepting deposits, should be held exempt from State taxation. Chief Justice Marshall in *Osborn v. The Bank, supra*, 860, 862, stated that these incidents, while constituting business of a private nature, were indissolubly fused with the Bank's public function of acting as the Government's fiscal agent, and were essential to the performance of that public function. He said that if the fiscal agent could have been created without the powers of making

loans and accepting deposits it would be difficult to sustain that part of the Bank's charter granting those powers, but, in fact, those powers constituted the vital part of the corporation and gave it its soul (862). The private operations of the Bank gave value to the currency which it placed in circulation, and the deposits received constituted a reservoir of credit for governmental needs (863, 864, 867).

The Bank of the United States at the period when the *McCulloch* and *Osborn* cases were decided (1819 and 1824) was no innovation in governmental structure. As a notable instance, it had its counterpart in the Bank of England, which, with similar attributes, had been in operation for more than a hundred years. No doubt Chief Justice Marshall regarded the private operations of a central bank as a rare instance of a government finding it necessary to engage in private enterprise. In fact, he stated that, the principle that a State might not interfere with any of the means of the National Government having been established, the State would be left in command of all its resources, harmony would result, and: "We have a principle which is safe for the States, and safe for the Union." *McCulloch v. Maryland, supra*, 430.

There was no general tendency at the time the Constitution was adopted for governments to engage in private enterprise, and the same was true at the period when the *McCulloch* and *Osborn* cases were decided. In *South Carolina v. United States, supra*, 456-458, this Court remarked that at the time the Constitution was adopted no one contemplated the entrance of a government, either State or National, into private business: the thoughts of men were then wholly engaged in devising means to forestall and circumvent the tyranny of gov-

ernments, all of which were held in distrust. The situation has now wholly changed. Very little thought is given to the possibility of governments becoming despotic, but it is common knowledge that a supposed tendency on the part of governments to enter into private business is being watched from many quarters with jealous and distrustful interest.

The activities of the State and National Governments in more recent years have come more and more into contact, and the courts endeavor to give every case a practical construction with the end in view of permitting each government to function with the minimum of interference with the other. Now, the question is one of degree only, and the more recent decisions recognize that, if an activity by one government is not essential to the performance of its inherent governmental functions, and if the levying of a tax because of that activity will not tend to hamper or cripple it in the carrying out of its proper duties, such tax may be levied by the other:

> *National Bank v. Commonwealth*, 9 Wall. 353, 362
> *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 522, 523-4, and cases cited therein.

In the *South Carolina* case, it was held that, while the internal revenue tax of the United States imposed an expense upon the State of South Carolina, it did not tend to hamper or cripple the State in the exercise of its police power. In the instant case, we assert that, while the payment of a privilege tax by the United States to the State of Alabama would constitute a matter of expense to the United States, the payment of that tax would not tend to hamper or cripple the United

States in the performance of its main purpose at Wilson Dam: to provide for the common defense.

The instant case is new to this court in one respect: it is the first case in which a State has sought to tax the National Government directly for exercising a privilege within its borders. The principle, however, is not new. In the *South Carolina* case this Court held that, when the State of South Carolina engaged in a private business which fell within the domain of the Federal taxing power, the State was subject to the Federal tax. The instant case involves the converse of that ruling. And, always assuming that the National and State Governments are equal within their respective spheres, we regard that case as controlling.

We suggest that whenever the United States engages in a new activity under color of the exercise of one of its granted constitutional powers the question should always be: is this activity a necessary one in the carrying out of the main purpose? There is nothing in Section 124 of the National Defense Act to indicate that Congress thought that the sale of surplus hydro-electric power was essential to the main purpose, but, on the other hand, for aught we know, Congress might just as readily have assumed that the sale of the surplus power would be subject to a State tax. The denial of the State's right to tax in this case comes not from Congress, but from the Executive, and comes from the refusal of the Secretary of War to pay the tax.

We have seen in the *South Carolina* case how this Court, in tracing a borderline over which the State of South Carolina might not step without being liable to tax, had in mind what might happen if the State of South Carolina and other States should decide to enter into every other field of activity of like character.

Always assuming that the government of a State and the government of the United States are equal and are supreme within their respective domains, we assert that the same borderline should be drawn in this case, because it is just as easy to foretell what would happen if the United States should determine to engage in every other activity open to it, in the same manner that it has engaged in the selling of power to the Alabama Power Company.

To give immunity from taxation to every not merely incidental, but non-essential, activity on the part of the United States, must necessarily wear down and render impotent the power of State government. Under the Constitution the power to levy and collect taxes was reserved to the States, because that power is a fundamental and necessary attribute of sovereignty. *Lane County v. Oregon*, 7 Wall. 71, 76-7. To permit the United States to claim immunity from taxation for its non-essential activities would, in the language of the opinion in *National Bank v. Commonwealth*, *supra*, at page 362, "convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States." The constitutional limitation upon the taxing power of the State cannot be so varied or extended as seriously to impair the power itself. *Metcalf & Eddy v. Mitchell*, *supra*, 523-4.

There is no field of industry in which the United States might not engage under its power to provide for the national defense, without considering the numerous other powers which under the Constitution it has the right to exercise. It could, for example, determine that facilities for providing for shoes and clothing for a

wartime army should be maintained in time of peace, so that the same would be available in time of war. Plants and machinery for keeping an army of four million men clothed and shod could be maintained in time of peace without the States having any right to question such a step, but it would not follow that, with a peacetime military establishment of less than two hundred thousand men, the National Government could make shoes and clothing to the limit of its plants and machinery and sell them in the general trade free from tax; yet this is precisely the principle which the United States will ask the Court to uphold in this case. The argument, of course, is that the United States, having its plants and machinery, is entitled to use them, and being entitled to use them is entitled to sell the products of the same, and thus reduce the expense of maintaining the plants and machinery. Such a course does indeed reduce the expense of maintenance, but it is unreasonable to say that the United States should be exempted from tax by the States if it sells its products in time of peace merely because it thus reduces the overhead cost.

The example given shows how easily the United States might enter any private business claiming immunity from tax, although a tax upon its activity in any particular field might not tend to hamper or cripple it in the performance of a governmental function. This is what the Court in *South Carolina v. United States* said the State of South Carolina might not do, and, if the government of a State is a sovereignty equal to the government of the United States, we submit that this Court should draw the borderline in this case, and say that the United States may not sell its hydro-electric power in Alabama free from the tax of the State.

One might say that there is no present reason to as-

cribe to the United States a design to infringe upon the revenue sources of the States. But the activities of the United States in the performance of its undoubted constitutional duties have been vastly broadened in the present generation, and the invasion might as readily result from circumstance as from design. The result to the States would be the same whether the invasion should be impelled by calculation or fortuity.

This case involves the balance between the powers of the State and National Governments, the maintenance of which the founders of our system regarded as of transcendent importance. To maintain the balance between the powers of the State Governments and the powers of the National Government there should be a balance of inconveniences of which the United States should bear its full share. It is to make the United States bear the burden of this inconvenience, that is, to bear the expense of this tax, and to save the State of Alabama from bearing more than its proper share of the public burden, that the State brings this suit.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

National Defense Act, Section 124 (Act of June 3, 1916, c. 134, 39 Stat. 166, 215), provides:

> SEC. 124. *Nitrate supply.*—The President of the United States is hereby authorized and empowered to make, or cause to be made, such investigation as in his judgment is necessary to determine the best, cheapest, and most available means for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers and other useful products by water power or any other power as in his judgment is the best and cheapest to use; and is also hereby authorized and empowered to designate for the exclusive use of the United States, if in his judgment such means is best and cheapest, such site or sites upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this act; and is further authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products.
>
> The President is authorized to lease, purchase, or acquire, by condemnation, gift, grant, or devise, such lands and rights of way as may be necessary for the construction and operation of such plants, and to take from any lands of the United States, or to purchase or acquire, by condemnation, materials, minerals, and processes, patented or otherwise, nec-

essary for the construction and operation of such plants and for the manufacture of such products.

The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.

The President is hereby authorized and empowered to employ such officers, agents, or agencies as may in his discretion be necessary to enable him to carry out the purposes herein specified, and to authorize and require such officers, agents, or agencies to perform any and all of the duties imposed upon him by the provisions hereof.

The sum of $20,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to enable the President of the United States to carry out the purposes herein provided for.

The plant or plants provided for under this act shall be constructed and operated solely by the Government and not in conjunction with any other industry or enterprise carried on by private capital.

In order to raise the money appropriated by this act and necessary to carry its provisions into effect, the Secretary of the Treasury, upon the request of the President of the United States, may issue and sell, or use for such purpose or construction hereinabove authorized, any of the bonds of the United States now available in the Treasury of the United States under the act of August fifth, nineteen hundred and nine, the act of February fourth, nineteen hundred and ten, and the act of March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed $20,000,000: *Provided*, That any Panama Canal bonds issued and sold or used under the provisions of this section may be made payable at such time after issue as the Secretary of the Treasury, in his discretion,

may deem advisable, and fix, instead of fifty years after date of issue, as in said act of August fifth, nineteen hundred and nine, not exceeding fifty years.

General Acts of Alabama, 1927, page 139, provide in part:

AN ACT IN REFERENCE TO AND TO FURTHER PROVIDE FOR THE GENERAL REVENUE OF THE STATE OF ALABAMA.

Be it Enacted by the Legislature of Alabama:

SECTION 1. Every person, firm, company, corporation, or association engaged in any business, vocation, occupation, calling, or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act or any other act.

SECTION 2. * * * 2-D. In addition to all other taxes of every kind now imposed by law or otherwise imposed by this Act, there is hereby levied a license or privilege tax upon each person, firm, corporation, agent, or officer engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama for the privilege of engaging in such business; said license or privilege tax shall be due and payable in advance on the first day of October of each year, and shall be in a sum equal to Two-Fifths of a Mill (2/5) upon each kilowatt hour of hyroelectric power manufactured and sold during the preceding calendar year.

SECTION 72. * * * in all proceedings under this Act, the license due October 1st shall not be delinquent before the first day of November of each year. * * *

Section 3056 of the Code of Alabama of 1923 provides as follows:

> All taxes becoming delinquent, bear interest at the rate of eight per cent per annum; and such interest must be added to and collected as part of the taxes, and reported in such manner as the state auditor may prescribe.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 82.

STATE OF ALABAMA, *Petitioner*,
v.
THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF FOR THE PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR THE PETITIONER.

QUESTION PRESENTED.

The question presented in this reply brief is the question whether or not the Court of Claims had jurisdiction of a suit to recover from the United States, which manufactures and sells hydro-electric power at Muscle Shoals in Alabama, a privilege or license tax imposed "upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydro-electric power in the State of Alabama."

STATUTE INVOLVED.

Section 145 of the Judicial Code (U. S. C., Title 28, Section 250) provides in part:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters: First: All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims', or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

SUMMARY OF ARGUMENT.

The State contends that the Court of Claims had jurisdiction of this suit as a claim founded upon an implied contract, as a claim for damages not sounding in tort, and as a claim founded upon the Constitution of the United States.

ARGUMENT.

The brief of the United States has made no mention of the point of constitutional law presented in

the petitioner's brief, the point which involves the right of the State of Alabama to collect a tax from the United States for manufacturing and selling hydro-electric power within the State. In its brief the United States denies that the Court of Claims had jurisdiction.

The State contends that the remedy is bound up with the right; that if the right exists, Section 145 of the Judicial Code is broad enough to provide the remedy.

In its petition the State alleged that it is entitled to recover upon the basis of an implied contract, and while we understand that the State is not limited to the ground averred in the petition, but may advance other grounds if the facts shown support them (*United States v. Behan*, 110 U. S. 338, 347; *Wisconsin Central R. R. v. United States*, 164 U. S. 190, 212) the State desires to present its argument upon the existence of an implied contract, before presenting two additional grounds which it conceives to be open to it.

There is a strong and appealing analogy in the cases requiring the United States, under an implied contract, to pay for private property which it takes for public use. We do not say that the instant case and those cases are the same, for, this being a case wherein the recovery of a tax is sought, it is one of novel impression; but this case in principle is very like some of those cases, and, what is more important, the facts giving rise to the implied obligation in a number of them were facts of the same character as those which exist here.

At the outset it must be said that the State cannot show any actual course of dealing between the of-

ficers of the State and those of the United States, but such was not necessary in a number of cases involving the taking of private property, and we believe it is not necessary here.

The facts upon which we predicate the implied contract are these: Congress enacted Section 124 of the National Defense Act providing for the construction and maintenance of a plant for the production of nitrates, which plant it was contemplated might be operated with hydro-electric power produced at the site. Congress gave the President the authority to sell the surplus products of the plant, which may have had reference to surplus nitrates only, but may have included all of the surplus products of the operation, including hydro-electric power. But the President had authority to sell the surplus hydro-electric power under the decision in *Chandler-Dunbar Water Power Co. v. United States*, 229 U. S. 53. Congress is presumed to know the Constitution in the same sense that a citizen is presumed to know the law. If a State had the power to tax the sales of any of the surplus products, including surplus hydro-electric power, Congress knew that fact at the time the National Defense Act was enacted, yet Congress did not disavow the right of a State to tax such sales, or seek to circumvent the levying of taxes in connection with such sales. No conditions were imposed upon such sales, and it follows that Congress expected the sales to be normal and usual sales attended by normal and usual consequences. The State, on its part, enacted a revenue measure imposing a uniform tax upon the manufacture and sale of hydro-electric power by any person. It invited anyone, including the United States, to manufacture and sell hydro-electric power within its borders, sub-

ject only to the payment of the tax. The plant and dam having been located in Alabama, the President manufactured and sold the surplus hydro-electric power. Thus, the United States manufactured and sold hydro-electric power expecting to pay a tax for the privilege of so doing, and the State, knowing that the United States was manufacturing and selling the power, expected to collect its privilege tax. Therefore, the one exercised the privilege, expecting to pay a tax for it, and the other granted the privilege, expecting to collect a tax for it, and the obligation of the United States to pay is contractual.

If the implied contract outlined here be considered tenuous, that criticism may be directed in equal measure against the implied contracts which have been found in numerous cases. Thus, in *United States v. Lynah*, 188 U. S. 445, a case arising under the Tucker Act in a Circuit Court under jurisdiction concurrent with the Court of Claims, an implied contract was found for paying for plantation land the practical use of which was destroyed through the raising of a river level about eighteen inches, as an incident to a navigation project, so that the drainage system was rendered ineffectual (468-469). In the *Lynah* case the Congressional authority was a series of appropriation acts for improving navigation on the Savannah River (466). There was obviously no course of dealing between the owners and the Government. There was no direction to take the particular property, but a direction to do that which resulted in the taking. There was no protest, but the lack of protest was deemed an assent to the appropriation by the Government (467). The Government did not deny the ownership of the plaintiff, and there was no

condemnation proceeding instituted, and no attempt in terms was made to take the title; but, nevertheless, it was held that if the acts done by the officers of the United States under the direction of Congress resulted in such injury as to render the land absolutely valueless, the property was, in contemplation of law, taken, and judgment might be rendered against the Government for the value of the property (468).

In *United States v. Great Falls Manufacturing Company*, 112 U. S., 645, 656, Congress had authorized the taking of lands for the construction of a water service system for the City of Washington, but the Act of Congress had not specifically ordered the petitioner's land to be taken. However, it was held that the making of the improvements necessarily involved the taking of the property, and if, for want of formal condemnation proceedings, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing compensation, there was no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under power of eminent domain, demand just compensation. This was a case decided before the Tucker Act was passed, but while the Act of February 24, 1855 (c. 122, 10 Stat. 612), as amended by the Act of March 3, 1863 (c. 92, 12 Stat. 765), was in effect, which gave jurisdiction to the Court of Claims upon contracts express or implied.

References to cases of this kind might be multiplied, but enough has been said to show that the contractual element in the implied contracts thus found depends upon a very slender fiction. The paramount

fact in these cases was that property had been taken which was acknowledged to belong to a private owner. Common justice, and the duty of the Government to grant compensation as required by the Constitution, supplied all but a fraction of the causes of action which were recognized.

So in this case, if it should be found that the State has the right to tax the United States for manufacturing and selling hydro-electric power, a cause of action, springing from the constitutional duty of the United States to pay the tax to the State, and based upon implied contract and within the terms of the Judicial Code, could logically be found, even though the contractual element be as slight as it was in the cases cited.

In *United States v. Louisiana,* 123 U. S. 32, this Court held that the forum of the Court of Claims is open to the States as well as to individual citizens. There was no suggestion in that decision that States before the Court of Claims may present only those causes of action which are of the classes inhering ordinarily in individuals. States have property rights which are peculiar to their character as governments. Individual citizens do not have the power to tax, but States have that power. If the doors of the Court of Claims are opened to the States at all it seems proper that they should be allowed to come in with the causes of action which are peculiar to them, as well as with those which are common with citizens, provided their peculiar causes of action are of the general types found within the four corners of Section 145 of the Judicial Code. The novelty, if there be a novelty, is the finding that States may enter the Court, not that some of their rights differ

in genesis, if not in essence, from those of ordinary citizens.

But the right to tax may not differ substantially from rights which appertain to individual citizens. A State, having the monopoly of taxation in its own field, in collecting a privilege tax exacts a toll from those who are given the franchise to exercise the privilege. A patentee, having a similar monopoly in the field of his own invention, collects a toll from those who are given the franchise to use his invention. This Court has held that when the United States has used a patentee's improvement with his consent, and with the expectation on his part of receiving compensation for the license, an implied contract for compensation arises. *United States v. Palmer,* 128 U. S. 262, 269. Also in *United States v. Berdan Fire-arms Company,* 156 U. S. 552, 567-568, where the findings were not very specific and emphatic as to the assent of the Government to the terms of any contract, they were held sufficient although they were largely negative in character, namely: that there was no denial of the patentee's rights to the invention, no assertion on the part of the Government that the patent was wrongfully issued, no claim of a right to use the invention regardless of the patent, no disregard of the claims of the patentee, and no use contrary to protest. The Government used the invention with the permission of the owner, and did not, when using it, repudiate his title. An implied contract found by the Court of Claims was upheld.

This explanation shows that while there are no precedents for a cause of action in which taxes due to a State are claimed, yet in essence such a claim

is of the same character as claims by private citizens which have been sustained by this Court.

The cases cited by the United States on pages 5 and 7 of its brief are not, in our opinion, applicable to the situation presented in the instant case. Those cases involved either claims clearly based upon torts (*Schillinger v. United States,* 155 U. S. 163; *Russell v. United States,* 182 U. S. 516; *Tempel v. United States,* 248 U. S. 121); or based upon work done by mistake in excess of the appropriation, and hence without authority of law, so that no contract, either express or implied could validly be made (*Sutton v. United States,* 256 U. S. 575); or were cases where the court found that there was no meeting of minds and therefore that the action was not based upon contract express or implied (*United States v. Minnesota Investment Company,* 271 U. S. 212; *Merritt v. United States,* 267 U. S. 338; *Goodyear Tire & Rubber Company v. United States,* 276 U. S. 287). It is true that in the three cases last cited the Court said that jurisdiction could not be given to the Court of Claims upon contracts implied in law, which might have been binding between private parties. However, in the *Minnesota Investment Company* case it is to be noted that the United States through its Comptroller General claimed as its own the interest accruing on a deposit by a litigant with the clerk of a United States Court, which under a court rule would belong to the litigant, and therefore it denied the title of the plaintiff to the money in question. Manifestly, there could be no meeting of minds under such circumstances. Also, in the *Merritt* case the plaintiff was a subcontractor under one who had contracted with the United States, and, the contractor having

made a fraudulent settlement, the United States exacted a sum of money from the contractor which the plaintiff contended should go to him, but which, for aught that was shown, was not exacted by the Government for his benefit, but was exacted as a penalty under a law which gave the United States such a right in case of fraud. In the *Goodyear* case, where the United States held over in its occupancy of premises into a fiscal year for which there was an appropriation available, but after giving notice that there was no intention to pay rent for a period beyond the actual period of occupancy, the United States was not held liable for rent for the full fiscal year, although a holding over might have been binding between private parties under the State law; but, as the Court pointed out, under applicable federal statutes the United States cannot be bound in that way, and the notice given by the Government negatived any intention to be bound.

In the instant case we are not asserting a contract implied in law, but a contract implied in fact, namely, implied from the facts that the United States manufactured and sold the power knowing the meaning of the Constitution, and therefore expecting to pay the tax, and that the State permitted the manufacture and sale expecting to collect the tax. These facts, in our view, are sufficient to constitute a convention between the parties and a coming together of minds.

There are, no doubt, numerous instances in which, between private parties, contracts are implied in law. Common among them are cases where tortious injuries have been committed, but where the plaintiff follows the common law practice of waiving the tort and suing in assumpsit. There is no semblance of

a tort in this case, and no basis for an assertion that the State is attempting to waive a tort and sue on such an implied contract.

We do not believe the cases cited on page 6 of the Government's brief are either controlling or persuasive in the instant case. In the cases of *Camden v. Allen,* 26 N. J. L. 398, *Nebraska City v. Gas Company,* 9 Nebr. 339, *Pierce v. City of Boston,* 3 Metc. (Mass.) 520, and *Carondelet v. Picot,* 38 Mo. 125, the opinions stated that where a remedy for the collection of taxes is given by statute it is exclusive, and resort may not be had to a personal action against the taxpayer. This is not the rule in Alabama, where taxes may be collected by a personal action in debt or assumpsit unless the taxing statute makes the statutory remedy exclusive. *State v. Fleming,* 112 Ala. 179. This is also the federal rule. *United States v. Chamberlin,* 219 U. S. 250, 262.

In *Nebraska City v. Gas Company, supra,* the Court said that taxes do not arise upon contract either express or implied; in *Pierce v. City of Boston, supra,* it was said that taxes are not contracts between party and party, either express or implied; and in *St. Joseph Land Company v. MacLean,* 32 Fed. (2d) 984, it was said that taxes are in no sense contractual; but those statements were in each case by way of dictum and not necessary to the conclusions reached. In *Perry v. Washburn,* 20 Calif. 318, *Peter v. Parkinson,* 83 Ohio St. 36, *Lane County v. Oregon,* 7 Wall. 71, *Meriwether v. Garrett,* 102 U. S. 472, and *Liberty Mutual Insurance Company v. Johnson Shipyards Company,* 6 Fed. (2d) 752, the decisions did not go this far, but by way of dictum they stated that taxes are not debts.

After having examined the legislative history of the Tucker Act of March 3, 1887, we are convinced that the Tucker Act was not intended to have any reference to common law forms of action. While the Tucker Bill was before the House it covered all classes of claims against the United States, with a few unimportant exceptions, and it covered claims in tort. The Senate eliminated claims sounding in tort by inserting the phrase "in cases not sounding in tort" as it now appears in the first paragraph of Section 145 of the Judicial Code. The legislative history shows not only that the Tucker Act was a great act of justice, which should not be strictly construed, (*United States v. Emery, Bird, Thayer Realty Company*, 237 U. S. 28, 32) but was a means whereby Congress intended to relieve itself of a great body of petitions which could better be attended to by a court of justice (*House Report 1077*, 49th Cong., 1st Session, page 3; *Cong. Rec.*, 49th Cong., 2nd Session, pages 2677-8). See also *Ex parte Bakelite Corporation*, 279 U. S. 438, 452.

We must show that our cause of action is one of those embraced within the Tucker Act, but that Act is certainly broad and covered a much wider scope than previous statutes which set forth the jurisdiction of the Court of Claims (see *Schillinger v. United States, supra* 166-167, in which previous acts covering the Court of Claims are quoted). If the State has the constitutional right to tax the United States, a suit in the Court of Claims for the recovery of the tax, rather than a suit for injunction against Government officers followed by a petition to Congress, is within what we understand to have been the contemplation of Congress in enacting the Tucker Act.

So much for our contention that the State has the right to recover as upon an implied contract. Two additional bases for recovery seem to be provided.

In its brief the United States apparently takes the position that the Court of Claims has jurisdiction only in cases where the claim is founded on a contract, either express or implied. However, it is to be noted that the first section of the Tucker Act, now embodied in Section 145 of the Judicial Code, contemplates four distinct classes of cases, the fourth class being "claims for damages, liquidated or unliquidated, in cases not sounding in tort." *Dooley v. United States*, 182 U. S. 222, 224. Decisions in cases of this fourth general class have been few, possibly for the reason that there are very few situations under which an action for damages will lie, in the absence of contract, and where no tort is involved.

In *United States v. Cornell Steamboat Company*, 202 U. S. 184, the petitioner's ship saved a cargo of sugar on another ship upon which duties had already been collected by the United States. The revenue law then provided that where cargoes were destroyed upon which duties had already been paid the duties should be refunded. Therefore, in saving the cargo the petitioner saved the Government from repaying duties, and in this case salvage on those duties was claimed. The United States contended that no contract express or implied could be found, and that suit might not be brought under the Tucker Act (185-186). The plaintiff contended that an implied contract grew out of the successful event of the service (188). The Court, however, held that, while salvage might be based on contract where the service was re-

quested, in this case the United States knew nothing about the service until after the service had been rendered (194); that in this case the claim was one for damages not sounding in tort, and recovery could be had (190).

In the case of *United States v. Morgan,* 99 Fed. 570, the Circuit Court of Appeals for the Fourth Circuit considered the nature of an action for salvage brought against the United States by the master of a ship which had come to the assistance of a United States light ship in distress and had towed it into port. After reciting the provisions of the Tucker Act, the Court said (571-2):

> "The first question is, is it a claim for salvage upon a contract, express or implied, or is it a claim for damages liquidated or unliquidated in a case not sounding in tort, in respect of which claim the party would be entitled to redress against the United States in a court of admiralty, if the United States were suable? If it be either, the Court has jurisdiction * * * Salvage clearly is not a tort."

The Court did not expressly find that this was a claim based upon an implied contract, saying that it made no difference whether it were that kind of a claim or a claim for damages not sounding in tort, but the Court's recognition of the latter as a separate class of claims cognizable under the Tucker Act is manifest.

In *Chappell v. United States,* 34 Fed. 673, the facts were these: The United States light-house board, acting under authority of Congress, erected two light houses as range lights to enable vessels to direct their course. For that purpose it was necessary that

there be no intervening objects between the light houses. The land of the plaintiff lay between the two lights, and the Government required of him that he keep the space intervening between the two lights free of buildings. He sued for compensation for the use of his land. A demurrer was interposed on the grounds, first, that the petition did not allege facts from which a contract, express or implied, could be deduced, and second, that the mere passing of light across the plaintiff's land could not be held to be a use of it, and that if he yielded to the directions of the federal officers not to obstruct the line of range he voluntarily consented to do what he could not be required to do and had no remedy at law. The Court, after reviewing the provisions of the Tucker Act, said (674, 675):

> "Under this law, which is broader in its terms than that by which heretofore claims against the United States were cognizable in the Court of Claims, if the plaintiff has suffered damage by being prevented from using his land, and he has properly stated his case, and that case as stated is not one sounding in tort, we do not see that upon the ground of jurisdiction his petition is demurrable * * * In requiring that the plaintiff should desist from building on his intervening land, the officers of the light-house board were doing a lawful and authorized act * * * It cannot be said therefore that their act was tortious * * * We are of opinion that the amended petition does state a case from which a promise to make compensation may be implied, or at any rate *it states a case not sounding in tort, entitling the plaintiff to recover any damages he may be able to prove have been sustained by him.*" (Italics supplied.)

Anyone exercising a privilege in Alabama which is subject to tax is obligated to pay the tax to the State. If the State has the right to collect the tax from the United States then the United States is likewise obligated to pay the tax to the State. The word "damages" is one of the broadest possible definition. It means "the indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another." *Bouvier's Law Dict.* (*Baldwin's Revision*) p. 263. "Damages may properly be defined as the pecuniary compensation, recompense, or satisfaction for an injury sustained, or, as otherwise expressed, the pecuniary consequences which the law imposes for the breach of some duty or the violation of some right." 8 R. C. L. 420. Furthermore, there is no novelty in claiming taxes under the score of damages. *United States v. Chouteau,* 102 U. S. 603; *United States v. Salen,* 244 Fed. 296. There is no element of tort present here, and so the claim would clearly be one for damages not sounding in tort, even if it should be held that the claim is not founded upon a contract.

But there is still another ground for a finding that the Court of Claims has jurisdiction: namely, a finding that this claim is one founded upon the Constitution of the United States. This also was a ground of jurisdiction new to the Tucker Act, and it has been given interpretation only in cases involving takings of property referable to the Fifth Amendment to the Constitution. Obviously, however, this provision of the Tucker Act is not limited to claims referable to the Fifth Amendment, else Congress in enacting the Tucker Act would have made such a

limitation. In our view, this provision covers claims under the Tenth Amendment to the Constitution as well as those under the Fifth Amendment. The Fifth Amendment is only one of the constitutional limitations to which the United States is subject. *Monongahela Navigation Company v. United States*, 148 U. S. 312, 336. By the Tenth Amendment the inherent sovereign power of the State to collect taxes is reserved and is acknowledged, as clearly as if that power were specifically mentioned in the Amendment, so the power of the State to collect taxes is as much a part of the Constitution as is the Fifth Amendment.

Mr. Justice Brown in his concurring opinion in *United States v. Lynah, supra*, 474-477, disagreed with the main opinion in which an implied contract was found, and took the view that the claim was one founded upon the Constitution, stating that claims founded upon the Constitution might be prosecuted in the Court of Claims whether sounding in contract or in tort. Two of his colleagues concurred in his view that the claim was founded upon the Constitution, but also took the view that it was based upon an implied contract, as was held in the main opinion (479). In *Phelps v. United States*, 274 U. S. 341, it was held that while the right to just compensation for the use of private property gave the owner a claim founded upon the Fifth Amendment, it was also one arising out of implied contract (343), and an amount equivalent to interest as a part of just compensation might be allowed notwithstanding Section 177 of the Revised Statutes, which prohibits the granting of interest by the Court of Claims, except where the same has been by contract specifically provided for (343-344).

This claim is unusual in that a State is attempting to recover taxes from the United States. In essence, however, as we have shown, the claim is very like the claims of private individuals which have been adjudicated by the Court of Claims. Furthermore, while the State, in contending that the claim will lie as a claim for damages not sounding in tort and as a claim founded upon the Constitution, is able to cite very few precedents, those grounds are set out precisely in the Tucker Act, and the fact that they have been infrequently availed of does not detract from their power. It seems, therefore, that if the Court should find that the State of Alabama has the right to collect the tax, the grounds for sustaining jurisdiction are more than ample.

Respectfully submitted,

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FILED
MAY 28 1930
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE STATE OF ALABAMA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 817

THE STATE OF ALABAMA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 9) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 12, 1930. (R. 30.) The petition for a writ of certiorari was filed on April 15, 1930. (R. 30.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the State of Alabama can recover in the Court of Claims from the United States, which manufactures and sells hydroelectric power at

Muscle Shoals in Alabama, a privilege or license tax imposed "upon each person, firm, corporation, agent or officer, engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama."

STATUTES INVOLVED

The statutes involved are set out in the Appendix (*infra*, pp. 7–11).

STATEMENT

The United States, having constructed a dam and power plant on the Tennessee River at or near Muscle Shoals, Alabama, under Congressional authority (Act of June 3, 1916, c. 134, Sec. 124, 39 Stat. 166, 215), has been engaged since 1925 in generating hydroelectric power. During the calendar year 1926 it sold to the Alabama Power Company, a private corporation, 429,311,000 kilowatt-hours of hydroelectric power so generated. (R. 6.)

On July 22, 1927, the legislature of the State of Alabama passed a revenue law which levied a license or privilege tax on each person or corporation engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama. Said tax amounted to two-fifths of a mill upon each kilowatt-hour of hydroelectric power manufactured and sold during the preceding calendar year. (R. 6.) The petitioner made demand on the United States for payment of the tax due in 1927. The United States declined to pay the tax. (R. 6–7.)

This suit was thereafter filed by petitioner in the Court of Claims to recover from the United States the amount of the tax for 1927 plus a penalty of fifteen per cent for failure to pay the tax when due. The United States demurred to the petition. The Court of Claims sustained the demurrer and dismissed the petition. (R. 22.)

ARGUMENT

The United States would not oppose a review of the question of construction and of the constitutional question raised if they were the only points involved. The question whether this commercial activity of the United States is exempt from State taxation is important. In *South Carolina* v. *United States*, 199 U. S. 437, the State was denied recovery of license taxes paid to the Federal Government for the privilege of allowing its agents to engage in the retail liquor business. This Court held that where a State engages in business of a private nature that business is not withdrawn from the Federal taxing power. While the exercise of the sovereign functions of a State is immune from Federal taxation, the exercise of its proprietary functions is not. We contend that the United States, unlike a State, can not within its constitutional powers engage in a private business, and that it has not done so in the instant case. *Gillespie* v. *Oklahoma*, 257 U. S. 501. We submit that the opinion of the court below on the merits was correct, but the question of whether the rule of the

South Carolina case can be extended to the United States is novel and important.

But we believe that it is clear that the Court of Claims erred in taking jurisdiction of the case. The petition sets forth no claim "upon any contract, express or implied, with the Government of the United States," nor any claim for damages in a case "not sounding in tort," within the meaning of Section 145 of the Judicial Code (p. 7, *infra*). It states an alleged obligation to pay a privilege or license tax imposed by the legislature of Alabama upon the Federal Government. A State may, like an individual, bring suit in the Court of Claims upon a proper cause of action. *United States* v. *Louisiana*, 123 U. S. 32. But the United States has not consented to be sued upon any ground alleged in the petition, and without such consent the Court of Claims has no jurisdiction. *Schillinger* v. *United States*, 155 U. S. 163.

The nature of a tax obligation is well established. It is sometimes loosely spoken of as a debt, but never as a debt based on any contractual relationship. Cooley's treatise on Taxation (Fourth Edition 1924), Section 22, states:

> A tax is not regarded as a debt in the ordinary sense of that term, for the reason that a tax does not depend upon the consent of the taxpayer and there is no express or implied contract to pay taxes. Taxes are not contracts between party and party, either express or implied; but they are the positive acts of the government, through its various

agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required.

In the following cases State courts have discussed the nature of a tax obligation and decided that it is not founded on contract or agreement. *Camden* v. *Allen*, 26 N. J. L. 398; *Perry* v. *Washburn*, 20 Cal. 318; *Carondelet* v. *Picot*, 38 Mo. 125; *Nebraska City* v. *Gas Company*, 9 Neb. 339; *Pierce* v. *City of Boston*, 3 Mete. (Mass.) 520; *Peter* v. *Parkinson, Treasurer*, 83 Ohio St. 36. This Court in *Lane County* v. *Oregon*, 7 Wall. 71, held that under the Acts of Congress of 1862 and 1863, making United States notes legal tender for debts, "debts" did not include tax obligations imposed by States, and quoted with approval the language used in *Camden* v. *Allen*, *supra*, that "a tax * * * is not founded on contract or agreement." The opinion of this Court in *Meriwether* v. *Garrett*, 102 U. S. 472, 513, draws the same distinction between debts and contractual obligations on the one hand and taxes on the other. In *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corp.*, 6 F. (2d) 752 (C. C. A. 2d), and *St. Joseph Land Co.* v. *MacLean*, 32 F. (2d) 984 (C. C. A. 8th), there are clear statements by the courts that taxes are in no sense contractual.

A debt or contract claim is subject to set-off, but a tax never is. Sums of money owing upon contract draw interest; taxes never do unless the taxing Act expressly provides for it. See *Perry County* v. *Selma M. & M. R. Co.*, 65 Ala. 391, 401.

A contract is based on agreement of the parties; a tax is imposed by the taxing authority with no regard to the taxpayer's consent.

Since the petitioner's claim for taxes is not a claim upon contract, the United States has not under Section 145 of the Judicial Code consented to be sued on such a ground and the Court of Claims should not have taken jurisdiction of the case.

CONCLUSION

The absence of jurisdiction of the Court of Claims seems so clear that we suggest the advisability of a dismissal or denial of the petition expressly upon the ground of want of jurisdiction of that court. If this Court does not feel that it should dispose of the petition in this manner, we do not oppose a review of the constitutional question decided by the Court of Claims, as well as the jurisdictional question.

Respectfully submitted.

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Attorneys.

MAY, 1930.

APPENDIX

STATUTES INVOLVED

Judicial Code, Section 145 (U. S. C., Title 28, Sec. 250), provides in part:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable:
>
> *Provided, however*, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

National Defense Act, Section 124 (Act of June 3, 1916, c. 134, 39 Stat. 166, 215), provides:

> The President of the United States is hereby authorized and empowered to make, or cause to be made, such investigation as in his judgment is necessary to determine the best, cheapest, and most available means for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers and other useful products by water power or any other power as in his judgment is the best and cheapest to use; and is also hereby authorized and empowered to designate for the exclusive use of the United States, if in his judgment such means is best and cheapest, such site or sites, upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act; and is further authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products.
>
> The President is authorized to lease, purchase, or acquire, by condemnation, gift,

grant, or devise, such lands and rights of way as may be necessary for the construction and operation of such plants, and to take from any lands of the United States, or to purchase or acquire by condemnation materials, minerals, and processes, patented or otherwise, necessary for the construction and operation of such plants and for the manufacture of such products.

The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.

The President is hereby authorized and empowered to employ such officers, agents, or agencies as may in his discretion be necessary to enable him to carry out the purposes herein specified, and to authorize and require such officers, agents, or agencies to perform any and all of the duties imposed upon him by the provisions hereof.

The sum of $20,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to enable the President of the United States to carry out the purposes herein provided for.

The plant or plants provided for under this Act shall be constructed and operated solely by the Government and not in conjunction with any other industry or enterprise carried on by private capital.

In order to raise the money appropriated by this Act and necessary to carry its provisions into effect, the Secretary of the Treasury, upon the request of the President of the United States, may issue and sell, or use for such purpose or construction hereinabove authorized, any of the bonds of the United States now available in the Treasury of the United States under the Act of August fifth, nineteen hundred and nine, the Act of February fourth, nineteen hundred and ten, and the Act of March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed $20,000,000: *Provided*, That any Panama Canal bonds issued and sold or used under the provisions of this section may be made payable at such time after issue as the Secretary of the Treasury, in his discretion, may deem advisable, and fix, instead of fifty years after date of issue, as in said Act of August fifth, nineteen hundred and nine, not exceeding fifty years.

General Acts of Alabama, 1927, page 139, provide in part:

AN ACT In Reference to and to Further Provide for the General Revenue of the State of Alabama

Be it Enacted by the Legislature of Alabama:

SECTION 1. Every person, firm, company, corporation, or association engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described

for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act or any other act.

SECTION 2. * * * 2-D. In addition to all other taxes of every kind now imposed by law or otherwise imposed by this Act, there is hereby levied a license or privilege tax upon each person, firm, corporation, agent or officer, engaged in the business of manufacturing and selling hydro-electric power in the State of Alabama for the privilege of engaging in such business; said license or privilege tax shall be due and payable in advance on the first day of October of each year, and shall be in a sum equal to Two-Fifths of a Mill (2 5) upon each kilowatt hour of hydro-electric power manufactured and sold during the preceding calendar year.

* * * * *

Approved, July 22, 1927.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE STATE OF ALABAMA, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 82

THE STATE OF ALABAMA, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 9) is reported in 38 F. (2d) 897.

JURISDICTION OF THIS COURT

The judgment of the Court of Claims was entered on March 12, 1930. (R. 30.) The petition for a writ of certiorari was filed on April 15, 1930. (R. 30.) The writ of certiorari was granted on June 2, 1930, 281 U. S. 718. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Court of Claims had jurisdiction of a suit by the State of Alabama to recover from the United States, which manufactures and sells hydroelectric power at Muscle Shoals in Alabama, a privilege or license tax imposed "upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama."

The petitioner has not discussed this jurisdictional question in its brief. It contends that the State may impose this privilege tax upon the United States. The Government in this brief confines its argument to the preliminary question of jurisdiction. We submit that this controls the instant case.

STATUTE INVOLVED

Section 145 of the Judicial Code (U. S. C., Title 28, Section 250) provides, in part:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to

redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

STATEMENT

The United States, having constructed a dam and power plant on the Tennessee River at or near Muscle Shoals, Alabama, under Congressional authority (Act of June 3, 1916, c. 134, Sec. 124, 39 Stat. 166, 215), has been engaged since 1925 in generating hydroelectric power. During the calendar year 1926 it sold to the Alabama Power Company, a private corporation, 429,311,000 kilowatt-hours of hydroelectric power so generated. (R. 6.)

On July 22, 1927, the legislature of the State of Alabama passed a revenue law which levied a license or privilege tax on each person or corporation engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama. This tax amounted to two-fifths of a mill upon each kilowatt-hour of hydroelectric power

manufactured and sold during the preceding calendar year. (R. 6.) The petitioner made demand on the United States for payment of the tax due in 1927. The United States declined to pay the tax. (R. 6, 7.)

This suit was thereafter filed by the petitioner in the Court of Claims to recover from the United States the amount of the tax for 1927 plus a penalty of 5%, for failure to pay the tax when due. The United States demurred to the petition on the ground that it did "not set forth a cause of action within the jurisdiction of" the Court of Claims. (R. 8.) The Court of Claims sustained the demurrer on the merits, holding the State tax an unconstitutional interference with the functions of the Federal Government, and dismissed the petition. (R. 22.) The petitioner thereupon petitioned to this Court for a writ of certiorari, which was granted, 281 U. S. 718.

ARGUMENT

We contend that the Court of Claims was without jurisdiction to consider the petition in this case and to determine the controversy on the merits. Under Section 145 of the Judicial Code (*supra*, pp. 2–3) that court is given jurisdiction, so far as the present question is concerned, to hear and determine:

> All claims * * * upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or

> unliquidated, in cases not sounding in tort, * * *.

A State may, like an individual, bring suit in the Court of Claims upon a proper cause of action. *United States* v. *Louisiana*, 123 U. S. 32. But the United States has not consented to be sued upon any ground alleged in the present petition, and without such consent the Court of Claims has no jurisdiction. *Schillinger* v. *United States*, 155 U. S. 163.

The petition states an alleged obligation to pay a privilege or license tax imposed by the legislature of Alabama upon the Federal Government. But such an obligation can not be said to result from "any contract, express or implied, * * *." It is not the result of agreement between the parties. Consequently, the Court of Claims had no jurisdiction; for, as stated by this Court in *Russell* v. *United States*, 182 U. S. 516, 530:

> To give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—"a coming together of minds."

A tax obligation is sometimes loosely spoken of as a debt, but it is not a debt based upon any contractual relationship. Cooley's treatise on Taxation (Fourth Edition 1924), Section 22, states:

> A tax is not regarded as a debt in the ordinary sense of that term, for the reason that a tax does not depend upon the consent of

> the taxpayer and there is no express or implied contract to pay taxes. Taxes are not contracts between party and party, either express or implied; but they are the positive acts of the government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required.

In the following cases State courts have discussed the nature of a tax obligation and decided that it is not founded on contract or agreement. *Camden* v. *Allen*, 26 N. J. L. 398; *Perry* v. *Washburn*, 20 Cal. 318; *Carondelet* v. *Picot*, 38 Mo. 125; *Nebraska City* v. *Gas Company*, 9 Nebr. 339; *Pierce* v. *City of Boston*, 3 Mete. (Mass.) 520; *Peter* v. *Parkinson, Treasurer*, 83 Ohio St. 36. This Court in *Lane County* v. *Oregon*, 7 Wall. 71, held that under the Acts of Congress of 1862 and 1863, making United States notes legal tender for debts, "debts" did not include tax obligations imposed by States, and quoted with approval the language used in *Camden* v. *Allen*, *supra*, that "a tax . . . is not founded on contract or agreement." To the same effect are *Meriwether* v. *Garrett*, 102 U. S. 472, 513; *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corp.*, 6 F. (2d) 752 (C. C. A. 2d), and *St. Joseph Land Co.* v. *MacLean*, 32 F. (2d) 984 (C. C. A. 8th).

It is clear that the petition in the Court of Claims is not founded on any express contract. It is equally clear that the petition is not founded upon

an implied contract, as that phrase is used in Section 145 of the Judicial Code. For, as this Court has said in *United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217:

> An implied contract in order to give the Court of Claims or a District Court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law.

To the same effect are *Merritt* v. *United States*, 267 U. S. 338, 340; *Sutton* v. *United States*, 256 U. S. 575, 581; *Tempel* v. *United States*, 248 U. S. 121.

It is true that an action of debt or assumpsit may, under many circumstances, be brought for the recovery of a tax from a private party. See *United States* v. *Chamberlin*, 219 U. S. 250. But the fact that a private individual would be liable, under the same circumstances, in an action of assumpsit, does not bring the case within the jurisdiction of the Court of Claims. In *Merritt* v. *United States*, 267 U. S. 338, 341, this Court said:

> The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.

A similar statement was made by the Court in *Goodyear Tire & Rubber Co.* v. *United States*, 276 U. S. 287, 293.

CONCLUSION

The judgment in this case should be reversed and the cause remanded to the Court of Claims with directions to dismiss for want of jurisdiction.

Respectfully submitted.

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BRADLEY B. GILMAN,
ERWIN N. GRISWOLD,
Attorneys.

JANUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 82.—October Term, 1930.

The State of Alabama, Petitioner, vs. The United States. } On Writ of Certiorari to the Court of Claims.

[February 24, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought in the Court of Claims by the State of Alabama to recover from the United States a tax imposed by the law of the State upon the privilege of manufacturing and selling hydro-electric power, together with interest at eight per cent. and a penalty of fifteen per cent. for failure to pay the tax when due. The claim is based upon a sale by the United States of the surplus power generated by it at its dam at Muscle Shoals, Alabama, under the Act of June 3, 1916, c. 134, § 124; 39 Stat. 166, 215. The Government demurred on the ground that the petition does not set forth a cause of action within the jurisdiction of the Court. The demurrer was sustained and the petition dismissed upon its merits. A writ of certiorari was granted by this Court. 281 U. S. 718.

We are of opinion that the petition should be dismissed, not upon the merits, which would import jurisdiction to deal with them, but for want of jurisdiction under the Act establishing the powers of the Court of Claims. Judicial Code, § 145, U. S. Code, Title 28, § 250. That jurisdiction extends to "all claims (except pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable; *Provided*" *etc.*

The contract to be recovered upon under § 145 Jud. Code must be an actual one, and, if implied, must be implied in fact, not merely implied by fiction, or as it is said, by law. *Baltimore & Ohio R. R. Co.* v. *United States*, 261 U. S. 592, 597. There is no ground for asserting an actual contract here. The State suggests that cases of property taken by eminent domain furnish an analogy. But in those cases where there is a recovery the United States admits the title that it takes and in view of the Constitution reasonably is understood to promise the compensation that in such circumstances it is bound to pay. *Phelps* v. *United States*, 274 U. S. 341, 343. *International Paper Co.* v. *United States*, January 19, 1931. But here the United States has not admitted and does not admit the right of the State to tax it for its sales and therefore does not by selling import a promise to pay for what so far as appears it does under a claim of right. Levying a tax does not create a contract. It is a unilateral act of superior power, not depending for its effect upon concurrence of the party taxed.

We do not see how the claim of the State can be said to be founded upon the Constitution. If the claim is valid, which we are far from implying, it is under the State's original powers as such, and the only bearing of the Constitution is that it did not take the power away. Neither do we regard the claim as one for damages in a case not sounding in tort within the meaning of the Act. There are few cases of this sort that cannot be brought under the head of a contract implied in law and it being established that such contracts are not within the jurisdiction of the Court of Claims, we think that this phrase cannot be extended to a controversy concerning the boundary between the two sovereign powers. The claim is not technically one for damages as was the claim in *assumpsit*. It is a claim for a tax that the United States never has promised to pay and for a penalty. It does not fall within the Act as it has been construed for many years.

Judgment reversed.

Petition to be dismissed for want of jurisdiction.

A true copy.

Test:

Clerk, Supreme Court, U. S.